Supreme Court, U.S.
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No. 00-___

In The

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

ULYSSES CHARLES SNEED.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Capital Case

Whether the redaction of a confession, in accordance with *Richardson v. Marsh*, 481 U.S. 200 (1987) — "redacted to eliminate not only the defendant's name, but any reference to his or her existence" — renders the confession involuntary in violation of the Fifth Amendment?

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DECISIONS BELOW

The decision of the Supreme Court of Alabama (App., *infra* at 1a–23a) overruling the application for rehearing and modifying its original opinion is not yet reported, but can be found at 2000 WL 1310517. The original decision of the Alabama Supreme Court, subsequently modified on rehearing (App. *infra* at 24a–45a), is not reported. The decision of the Alabama Court of Criminal Appeals (App., *infra* at 46a–86a) is not yet reported, but can be found at 1999 WL 254455.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Alabama, overruling the State's application for rehearing and modifying its original June 30, 2000 opinion, was entered on September 15, 2000. This Court's jurisdiction rests upon 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

On October 22, 1993, Ulysses Charles Sneed was indicted along with a co-defendant, John Milton Hardy, for the capital offense of murder committed during a robbery in the first degree. *See Ala. Code* § 13A-5-40(a)(2) (1975). Both men were charged in the same indictment because they were alleged to have participated in the same act — the robbery and murder of Clarence Nugene Terry. *See* Rule 13.3(b)(1), *Ala. R. Crim. P.* Pursuant to the *Alabama Rules of Criminal Procedure*, defendants jointly indicted are to be jointly tried unless "it appears that a defendant or the state [will be] prejudiced" as a result. *See* Rules 13.3(d) and 13.4(a), *Ala. R. Crim. P.* In such a case, the trial court "may grant a severance of defendants, or provide whatever other relief justice requires." Rule 13.4(a), *Ala. R. Crim. P.* Here, the trial court determined that a severance was not required and proceeded to conduct a joint trial.

Prior to trial, John Hardy filed a motion for a severance. Sneed did not join the motion nor make a similar request. He did, however, subsequently move for a severance when an issue arose concerning the admission of his confession. Specifically, in an effort to protect Hardy's right to confront the witnesses against him, the State offered into evidence a redacted version of Sneed's statement. *See Bruton v. United States*, 391 U.S. 123 (1968) (holding that the admission of a non-testifying defendant's confession, implicating his co-defendant in the crime, violates the co-defendant's rights under the Confrontation Clause of the Sixth Amendment notwithstanding any cautionary instruction to the jury). The statement was redacted to "eliminate not only [Hardy's] name, but any reference to his . . . existence." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). This required removing portions of the statement and included

substituting the pronoun "I" where Sneed actually said "we."[1] The redacted statement was admitted into evidence over Sneed's repeated objections. The jury found Sneed and Hardy guilty of capital murder and both were subsequently sentenced to death.[2]

On appeal to the Alabama Court of Criminal Appeals, Sneed "[did] not argue . . . that being indicted jointly with Hardy was improper, but that the joinder became improper when the redacted statement was admitted into evidence." App., *infra* at 50a. More specifically, Sneed claimed that eliminating all references to Hardy's existence from his statement "'distorted the facts of the case and enlarged [his] role in the offense.'" App., *infra* at 50a. "He further argue[d] that the admission of the redacted statement 'hampered his ability to put on his defense,' 'violated the rule of completeness,' and 'unlawfully limited [his] right to cross-examination.'" Id. While acknowledging that the "statement was changed considerably by the redaction," the Court of Criminal Appeals unanimously rejected each of the claims raised by Sneed. App., *infra* at 54a. The court found that "the gist of what Sneed claims was improperly redacted from his statement was presented to the jury through testimony of other witnesses, through demonstrative evidence, and through facts elicited on cross-examination." App., *infra* at 57a.[3] Because Sneed did not

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[1] Sneed's confession — in both original and redacted form — can be found within the opinion of the Alabama Supreme Court. App., *infra* at 4a–11a.

[2] The Alabama Supreme Court affirmed John Hardy's conviction and death sentence on November 3, 2000. *Ex parte Hardy*, No. 1981646, 2000 WL 1651203 (Ala. November 3, 2000).

[3] An example of the reasoning employed by the court is its recognition that the video surveillance tape — depicting the murder as it actually occurred and conclusively establishing Hardy's role as the

raise the claim, the Court of Criminal Appeals did not consider the issue of whether the redaction of his statement had the effect of compelling him to be a witness against himself.

In the Supreme Court of Alabama, Sneed raised the same claims — regarding the redaction of his confession — that he asserted in the Court of Criminal Appeals. Specifically, he claimed that the redaction violated the rule of completeness, unlawfully limited his right to cross-examination, and "enlarged [his] role in the offense, effectively nullifying [his] defense that he lacked the specific intent to commit murder." App., *infra* at 11a–12a. The Supreme Court of Alabama began its analysis of Sneed's claims by setting forth the holdings of this Court's opinions in *Bruton v. United States*, 391 U.S. 123 (1968) and *Richardson v. Marsh*, 481 U.S. 200 (1987). App., *infra* at 4a. The court then, noting that it had not previously addressed the issue raised, looked to other jurisdictions for guidance. App., *infra* at 13a.[4] At the conclusion of this discussion, the court held as follows:

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triggerman — refuted Sneed's claim that, because of the redacted statement, the jury might deem him to be the only active participant in the robbery.

[4] In that context, the Alabama Supreme Court cited the following opinions: *United States v. Mussaleen*, 35 F.3d 692, 696 (2d Cir. 1994) (holding that "[s]ince the redacted version of [the] statement conveys the substance and context of the statement as a whole, it does not offend the rule of completeness"); *United States v. Washington*, 952 F.2d 1402, 1404 (D.C. Cir. 1991) (rejecting defendant's claim that redaction of his post-arrest statement violated "his Sixth Amendment confrontation right, his Fifth Amendment right to due process, and rule of completeness"); *United States v. Long*, 900 F.2d 1270, 1279 (8th Cir. 1990) (rejecting defendant's claim that the redaction of her statement violated the rule of completeness); *United States v. Castro*, 813 F.2d 571 (2d Cir. 1987) (same); *People v. Mahboubian*, 543 N.E.2d

> We now apply the foregoing legal principles to the case before us. Sneed's jury would have had to conclude that the edited and redacted version of his statement admitted at trial was untruthful in order to accept his defense that he lacked the specific intent to commit murder. In this respect, Sneed's rights were sacrificed in order to accommodate the State's interest in conducting a joint trial.
>
> *It is axiomatic that an admissible confession is a voluntary statement by the defendant waiving his privilege under the Fifth Amendment to the United States Constitution against being compelled to be a witness against himself. The scope of the waiver must be measured by the words used in his voluntary act—i.e., his confession. Here, Sneed voluntarily gave a statement, but the State's significant and prejudicial alteration of the import of that statement effectively compelled his testimony as to matters to which he did not agree when he gave his statement.*

App., *infra* at 16a. (emphasis added).[5] The court arrived at its conclusion despite the fact that none of the cases it cited for guidance even mentioned the Fifth Amendment right against self-incrimination, much less based a holding upon it. Moreover, the court even went beyond the scope of Sneed's arguments to conclude that the

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34 (1989) (finding that defendant "suffer[ed] undue prejudice as a result of the redaction).

[5] In *Malloy v. Hogan*, 378 U.S. 1 (1964), this Court held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States.

redaction rendered the statement involuntary. In arguing for reversal, Sneed never asserted such a claim.

Four of nine justices dissented from the majority's finding that Sneed's conviction was due to be reversed. While acknowledging that "Sneed's original statement was altered by the redaction," the dissenting justices determined that "the substance of the redacted material was presented to the jury through the testimony of other witnesses, through demonstrative evidence, and through facts elicited on cross-examination." App., *infra* at 20a. They additionally noted that "[t]he admission of the redacted statement did not hamper Sneed's ability to put on a defense, did not violate the rule of completeness, and did not limit his ability to cross-examine witnesses." App., *infra* at 21a.

Regarding the facts surrounding the offense itself, the opinion of the Alabama Supreme Court contains the following summary:

> On August 29, 1993, Sneed and Chris Hines drove from Louisville, Kentucky, to Alabama. The two men came to Alabama to look for jobs. Sneed stayed with Hines and Hardy, who is Hines's cousin. In the early morning hours of September 7, 1993, Sneed and Hardy borrowed Hines's automobile and went to buy beer; Hardy was driving and Sneed was a passenger. Hardy drove to his house, where he picked up a rifle and put it in the car. He then drove to Bud's Convenience Store in Decatur. Hardy pulled his shirt sleeves from his shirt, and Hardy and Sneed tied the sleeves around their faces as masks. Sneed opened the door to the convenience store. Hardy stepped into the store and began firing his rifle at Terry, the store clerk. Hardy's first shot missed Terry, who tried to hide behind the counter. As Hardy

> fired at Terry, Sneed ran behind the counter toward the cash register. While Sneed attempted to open the cash register, Hardy leaned over the counter and shot Terry in the chest. Hardy then walked around the counter and shot Terry five times in the head and face. While Terry lay dying on the floor, Sneed and Hardy continued their attempt to open the cash register; they were unsuccessful. Sneed and Hardy unplugged the cash register and took it with them as they ran from the store. These events were recorded on the convenience store's surveillance video camera.
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> Later that morning, Sneed, Hardy, and Hines went to Hardy's father's house, where Sneed and Hardy had left the cash register. Using a sledgehammer, the three men tried to open the register. When the police recovered the cash register, they found Hines's fingerprint on it. The police showed the surveillance video to several people, including Hines. Four of those people, including Hines, identified Hardy as the shooter and Sneed as the unarmed man.

App., *infra* at 2a–3a.[6]

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[6] In its original June 30, 2000 opinion, the Alabama Supreme Court characterized this factual summary as being derived solely from the "evidence presented at trial." App., *infra* at 25a. In its application for rehearing, the State pointed out the contradiction between the court's own factual summary and its finding that, as a result of the redacted statement, the jury was presented with a distorted picture of the respective roles of Sneed and Hardy in the offense. Presumably in response — and without changing a word of the factual summary — the court added a footnote to its modified opinion, stating that the "facts were obtained both from the evidence presented at trial and from Sneed's unredacted statement." App., *infra* at 2a, n.2. The record plainly establishes, however, that Hardy's involvement in the crime —

REASONS FOR GRANTING THE PETITION

In reversing Sneed's conviction, the Alabama Supreme Court held that the redaction of Sneed's confession resulted in a "prejudicial alteration of the import of [the] statement [that] effectively compelled his testimony as to matters to which he did not agree when he gave his statement." App., *infra* at 16a. Although several federal and state courts have considered the effects of redaction on the declarant, Petitioner has not found any other court holding that the alteration of a statement — the alteration that necessarily results from eliminating any reference to a co-defendant's existence — renders the statement involuntary within the meaning of the Fifth Amendment. Because the reasoning of the Alabama Supreme Court is at odds with *Richardson v. Marsh*, because it stands alone in the face of other courts that have confronted this issue, and because it represents a significant departure from the relevant jurisprudence of this Court, certiorari should be granted. *See Crane v. Kentucky*, 476 U.S. 683 (1986) ("Because the reasoning of the Kentucky Supreme Court is directly at odds with language in several of this Court's opinions . . . and because it conflicts with the decisions of every other state court to have confronted the issue, . . . we granted the petition for certiorari."); *Lilly v. Virginia*, 527 U.S. 116 (1999) ("Our concern that [the decision of the Virginia Supreme Court] represented a significant departure from our Confrontation Clause jurisprudence prompted us to grant certiorari.").

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as described in Sneed's original statement and the factual summary above — was conclusively demonstrated by the evidence presented. (*See* summary of the evidence set forth in the opinion of the Court of Criminal Appeals at App., *infra* at 47a–49a.)

1. In *Bruton v. United States*, 391 U.S. 123 (1968), this Court held that "a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v. Marsh*, 481 U.S. 200, 202 (1987). Subsequently, *Richardson* posed the question of "whether *Bruton* requires the same result when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." *Richardson*, 481 U.S. at 202. This Court determined that, in such a circumstance, the protective rule of *Bruton* does not apply. *See Richardson*, 481 U.S. at 211 ("We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.").

In *Richardson*, this Court expressly refrained from expressing an opinion "on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211, n. 5. The Court has yet to pass on the latter possibility, but has since rejected the former. Specifically, *Gray v. Maryland*, 523 U.S. 185 (1998), involved the admission of a confession that had been redacted "by substituting for the defendant's name . . . a blank space or the word 'deleted.'" *Id.* at 188.[7] This Court held that a statement redacted in

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[7] Petitioner acknowledges that the cases discussed — *Bruton*, *Richardson*, and *Gray* — address Confrontation Clause issues, rather than a contention that redaction violates the constitutional rights of the confessing defendant. The fact that the Court has not considered

such a manner falls within the protective rule of *Bruton* and is, therefore, inadmissible. *See Gray*, 523 U.S. at 192 ("Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration, . . . leave statements that, considered as a class, so closely resemble *Bruton's* unredacted statements that, in our view, the law must require the same result."). In arriving at its conclusion, this Court repeatedly emphasized the differences between replacing a codefendant's name with a black space or symbol and completely eliminating any reference to his or her existence. See *Gray*, 523 U.S. at 190–91 (noting that in *Richardson* "[t]he State had redacted the confession of one defendant, Williams, so as to 'omit all reference' to his codefendant, Marsh — 'indeed, to omit all indication that anyone other than . . . Williams' and a third person had 'participated in the crime'"); *see also Id.* at 192 ("Nonetheless, unlike *Richardson's* redacted confession, this confession refers directly to the 'existence' of the nonconfessing defendant."). [8]

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the issue from the standpoint of the declarant, presents an additional basis for the granting of certiorari. *See* Rule 10(c), *Rules of the Supreme Court of the United States.*

[8] *But see Gray*, 523 U.S. at 203 (Scalia, J., dissenting) ("To my knowledge we have never before endorsed — and to my strong belief we ought not endorse — the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown."); *Id.* at 203, n. 1 ("The court is mistaken to suggest that in *Richardson v. Marsh*, we endorsed rewriting confessions as a proper method of redaction. There the parties agreed to the method of redaction and we had no occasion to address the propriety of editing confessions without showing the nature of the editing.") (citations omitted).

The only method of redaction expressly upheld by this Court is, therefore, one that involves the "eliminat[ion of] not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S. at 211. This case involves exactly that — Sneed's confession was "redacted to eliminate not only [John Hardy's] name, but any reference to his . . . existence." Such an action necessarily required an alteration of the original statement. The Alabama Supreme Court's reasoning — that the redaction "effectively compelled [Sneed's] testimony as to matters to which he did not agree when he gave his statement" — is at odds with *Richardson*.

If, as was held by the Alabama Supreme Court, "[t]he scope of [a defendant's] waiver [of his Fifth Amendment right] must be measured by the words used in his voluntary act—i.e., his confession," a redaction in accordance with *Richardson* — absent the express consent and waiver of the declarant — renders the statement involuntary. The reasoning of the Alabama Supreme Court, therefore, leads to the inference that this Court has condoned the intrusion upon a defendant's Fifth Amendment rights in order to protect a co-defendant's right to confrontation. Because this reasoning conflicts with this Court's opinion in *Richardson*, the petition for a writ of certiorari should be granted. *See Colorado v. Connelly*, 479 U.S. 157 (1986) ("Because the [lower court's] decision seemed to conflict with prior holdings of this Court, we granted certiorari."); *Crane v. Kentucky*, 476 U.S. 683 (1986) ("Because the reasoning of the Kentucky Supreme Court is directly at odds with language in several of this Court's opinions, . . . we granted the petition for certiorari.").

2. Even prior to this Court's decision in *Bruton*, federal and state courts were using redaction as a way of avoiding problems arising from the use of confessions in

joint trials. *See Bruton*, 391 U.S. 134, n. 10 (noting that "[s]ome courts have required deletion of references to codefendants where practicable" and providing relevant citations). Although the use of redaction goes back many years, this Court has never addressed the issue from the standpoint of the declarant. Numerous federal and state courts have, however, considered the issue in such a context. Other than the Supreme Court of Alabama, Petitioner has not found any court determining that the redaction of a statement rendered it involuntary within the meaning of the Fifth Amendment.

A number of United States courts of appeals have considered claims of defendants asserting that the redaction of their statement — done in an effort to protect a codefendant — warranted a reversal of their convictions. Virtually all, however, addressed the issue on grounds other than the Fifth Amendment and did not allude to the possibility that the use of redaction may render a statement involuntary.[9] In fact, Petitioner has

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[9] *See United States v. Edwards*, 159 F.3d 1117, 1126–27 (8th Cir. 1998) ("conclud[ing] the district court did not abuse its discretion in the balance it struck between the nontestifying declarants' right to completeness and the nonconfessing defendants' Confrontation Clause rights"), *cert. denied*, 528 U.S. 825 (1999); *United States v. Range*, 94 F.3d 614, 620–21 (11th Cir. 1990) (addressing and rejecting claim pursuant to "rule of completeness"); *United States v. Bolden*, 92 F.3d 686, 687 (8th Cir. 1996) (addressing and rejecting claim pursuant to "rule of completeness"); *United States v. Mussaleen*, 35 F.3d 692, 696–97 (2d Cir. 1994) (rejecting claim that redaction violated "rule of completeness" and weakened declarant's defense); *United States v. Velasco*, 953 F.2d 1467, 1474–76 (7th Cir. 1992) (rejecting claim that redaction violated "rule of completeness"); *United States v. Washington*, 952 F.2d 1402, 1403–04 (D.C. Cir. 1991) (addressing the issue, and rejecting the claim, in terms of the Sixth Amendment right to confrontation, Fifth Amendment right to due process, and the federal "rule of completeness"), *cert. denied*, 503 U.S. 1009 (1992); *United States v. Long*, 900 F.2d 1270, 1278–79 (8th Cir. 1990)

found only two United States courts of appeals' decisions which indicate that a statement redacted pursuant to a *Bruton* concern may result in a violation of the right against self-incrimination. *Howard v. Moore*, 131 F.3d 399 (5th Cir. 1997), *cert. denied*, 525 U.S. 843 (1998); *United States v. Marin*, 669 F.2d 73 (2d Cir. 1982). Neither court, however, found a violation and neither indicated that a redaction in and of itself can render a statement involuntary. Rather, both indicated that the Fifth Amendment is implicated if the redaction places the declarant in a situation where he or she feels compelled to testify. *See Marin*, 669 F.2d at 85, n.6 (stating that the "Fifth Amendment right to remain silent is violated when the omission 'paint(s) a distorted picture . . . which (the defendant is) powerless to remedy without taking the stand' . . . and results in 'substantial' prejudice to the defendant.") (citations omitted).[10] Plainly, the Alabama

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(addressing and rejecting claim pursuant to "rule of completeness"); *United States v. Lopez*, 898 F.2d 1505, 1510–11 (11th Cir. 1990) (addressing and rejecting claim pursuant to rule 14 of the *Federal Rules of Criminal Procedure* and the "rule of completeness"); *United States v. Alvarado*, 882 F.2d 645, 650–51 (2d Cir. 1989) (addressing the issue pursuant to the "rule of completeness" and finding no violation), *cert. denied* 493 U.S. 1071 (1990); *United States v. Castro*, 813 F.2d 571, 574–77 (2d Cir.) (rejecting claim that redaction violated "rule of completeness"), *cert. denied*, 484 U.S. 844 (1987); *United States v. Smith*, 794 F.2d 1333, 1335–36 (8th Cir.) (rejecting claim that redaction violated "rule of completeness"), *cert. denied*, 479 U.S. 938 (1986); *United States v. Thuna*, 786 F.2d 437, 441–42 (1st Cir.), *cert. denied*, 479 U.S. 825 (1986); *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984) (addressing and rejecting claim pursuant to "rule of completeness"), *cert. denied*, 479 U.S. 1217 (1985).

[10] For the relevant proposition, *Marin* cites *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981). The *Walker* case is the only United States court of appeal's case discovered by Petitioner finding a violation of the Fifth Amendment due to the exclusion of portions of a statement. It did not, however, involve a *Bruton* issue. Rather, the trial court had allowed the Government to introduce selected portions

Supreme Court did not hold that Sneed's rights were violated because he may have felt compelled to testify. Rather, its decision was based on a finding that the redaction rendered the statement itself involuntary. Moreover, any claim that Sneed may have felt compelled to testify — as a result of the redaction — would be unfounded. Sneed did not testify and everything he contends was improperly redacted from his statement was presented to the jury through other means. *See* App., *infra* at 20a, 57a–58a.

A number of state Supreme Courts have also addressed *Bruton* issues from the standpoint of the declarant. Petitioner has, however, found none addressing the relevant issue in a manner consistent with the holding of the Alabama Supreme Court.[11] Because

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of the defendant's prior testimony while refusing to admit other relevant parts. The Court of Appeals for the Seventh Circuit held that "the Government's incomplete presentation may have painted a distorted picture of Walker's prior testimony which he was powerless to remedy without taking the stand." *Id.* at 713; *see also Burns v. Beto*, 371 F.2d 598, 602 (5th Cir. 1966) (dictum).

[11] *See, e.g., Butler v. United States*, 614 A.2d 875 (D.C. Cir. 1992) (addressing the issue pursuant to the federal "rule of completeness" and finding no violation), *cert. denied*, 506 U.S. 1009 (1992); *State v. Sitting Crow*, 428 N.W.2d 268 (S.D. 1988) (stating the introduction of redacted statements permissible 'if all parts of the extra judicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant"); *Commonwealth v.* Young, 397 A.2d 1234 (Pa. 1979) (noting that in certain circumstances a confession cannot be effectively redacted without prejudicing the declarant"); *People v. Dorsey*, 410 N.E.2d 1132 (Ill. 1980) (finding that "editing of statement changed [defendant's] theory of the case" and was "highly prejudicial"); *State v. Barnett*, 252 A.2d 33 (N.J. 1969) (holding that "[defendant's] right to a fair trial required that his statement be introduced, if at all, in substantially its original form which contained much exculpatory material"); *People v. LaBelle*, 222 N.E.2d 727 (N.Y. 1966) (finding violation of a fair trial because "redacted statement . . . took on an entirely different import . . . and distorted the picture . . .

the lower court's opinion stands alone in the face of every other court that has confronted the issue, certiorari should be granted. *See Crane v. Kentucky*, 476 U.S. 683 (1986) ("Because the reasoning of the Kentucky Supreme Court . . . conflicts with the decisions of every other state court to have confronted the issue, . . . we granted the petition for certiorari.").

3. It is undisputed that "Sneed voluntarily gave a statement" to law enforcement authorities. This was a finding expressly set forth in the opinion of the Alabama Supreme Court. App., *infra* at 16a. Moreover, Sneed did not contend to the contrary in appealing his conviction. The Alabama Supreme Court's holding — that an otherwise voluntary statement is rendered "involuntary" upon being redacted in accordance with *Richardson* — represents "a significant departure" from this Court's prior "voluntariness" cases. *See Colorado v. Connelly*, 479 U.S. 157 (1986) (setting forth the meaning of "voluntary" as it is defined by the Due Process Clause of the Fourteenth Amendment).

The fact that Sneed's statement was redacted to remove any reference to his codefendant, John Hardy, simply did not render the statement involuntary. Redacting a statement to remove any reference to a co-defendant or his existence necessarily requires alteration of the original statement. Contrary to the opinion of the Alabama Supreme Court, the redaction of Sneed's statement did not "effectively compel his testimony as to matters to which he did not agree when he gave his statement." The redacted statement was only inaccurate

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presented to the Grand Jury"); *People v. Aranda*, 407 P.2d 265 (1965) ("[A trial court] can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant.").

in that it did not contain any reference to the involvement of another individual. Anytime a statement is redacted to remove any reference to a codefendant or his existence, however, and other evidence — including the joint trial itself — establishes the involvement of another party, the redacted statement will be technically inaccurate. In Sneed's case, this specific aspect of the redaction was cured pursuant to instruction from the trial court and the testimony of two police officers. Both informed the jury that the redacted statement was not Sneed's complete statement. App., *infra* at 13a.

Moreover, the redaction did not result in Sneed claiming responsibility for behavior that the original statement attributed solely to Hardy. Again, in accordance with *Richardson*, any reference to the existence of Hardy was eliminated from the statement. When Sneed stated "we" did something, the statement was changed to read "I" did something. This did not, however, change the meaning of the statement in terms of Sneed's personal culpability. When Sneed told police "we" did something, he obviously included himself in the action described. The Alabama Supreme Court's holding that the redaction rendered the statement involuntary was erroneous and inconsistent with the relevant jurisprudence of this Court. Certiorari should, therefore, be granted. *See Lilly v. Virginia*. 527 U.S. 116 (1999) ("Our concern that [the decision of the Virginia Supreme Court] represented a significant departure from our Confrontation Clause jurisprudence prompted us to grant certiorari.").

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Alabama should be granted.

Respectfully submitted,

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SUPREME COURT OF ALABAMA

EX PARTE ULYSSES CHARLES SNEED

(In Re Ulysses Charles Sneed v. State)
1981660
September 15, 2000

PER CURIAM

Ulysses Charles Sneed was convicted of capital murder for the killing of Clarence Nugene Terry. The murder was made capital because it was committed during the course of a robbery in the first degree. See § 13A-5-40(a)(2), *Ala. Code* 1975. Sneed was tried with a codefendant, John Milton Hardy; Hardy also was convicted of capital murder. See *Hardy* v. State, [Ms. CR-95-0589, March 26, 1999] ___ So.2d ___ (Ala.Crim.App.1999). (Hardy's case is pending before this Court on certiorari review (no. 1981646).) The jury, by a vote of 10-2, recommended that Sneed be sentenced to death by electrocution. The trial court, after independently weighing the aggravating and mitigating factors, concurred with the jury's recommendation and sentenced Sneed to death.[1]

The Court of Criminal Appeals affirmed Sneed's conviction and sentence. See *Sneed v. State*, [Ms. CR-95-0587, April 30, 1999] ___ So.2d ___ (Ala.Crim.App.1999). This Court granted Sneed's petition for certiorari review. Because we find that the trial court erred in admitting into evidence an edited and redacted version of a

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[1] By the same vote of 10-2, the jury recommended that Hardy be sentenced to death. The trial court also concurred with the jury's recommendation as to Hardy and sentenced him to death.

statement that Sneed had made to police officers, we reverse and remand.

I.

The record indicates the following facts.[2] On August 29, 1993, Sneed and Chris Hines drove from Louisville, Kentucky, to Alabama. The two men came to Alabama to look for jobs. Sneed stayed with Hines and Hardy, who is Hines's cousin. In the early morning hours of September 7, 1993, Sneed and Hardy borrowed Hines's automobile and went to buy beer; Hardy was driving and Sneed was a passenger. Hardy drove to his house, where he picked up a rifle and put it in the car. He then drove to Bud's Convenience Store in Decatur. Hardy pulled his shirt sleeves from his shirt, and Hardy and Sneed tied the sleeves around their faces as masks. Sneed opened the door to the convenience store. Hardy stepped into the store and began firing his rifle at Terry, the store clerk. Hardy's first shot missed Terry, who tried to hide behind the counter. As Hardy fired at Terry, Sneed ran behind the counter toward the cash register. While Sneed attempted to open the cash register, Hardy leaned over the counter and shot Terry in the chest. Hardy then walked around the counter and shot Terry five times in the head and face. While Terry lay dying on the floor, Sneed and Hardy continued their attempt to open the cash register; they were unsuccessful. Sneed and Hardy unplugged the cash register and took it with them as they ran from the store. These events were recorded on the convenience store's surveillance video camera.

Later that morning, Sneed, Hardy, and Hines went to Hardy's father's house, where Sneed and Hardy had

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[2] These facts were obtained both from the evidence presented at trial and from Sneed's unredacted statement.

left the cash register. Using a sledgehammer, the three men tried to open the register. When the police recovered the cash register, they found Hines's fingerprint on it. The police showed the surveillance video to several people, including Hines. Four of those people, including Hines, identified Hardy as the shooter and Sneed as the unarmed man.

In his statement to police, Sneed admitted that he had participated in the robbery, but stated that he did not intend for anyone to get hurt. The indictment against Sneed alleged that he had committed the capital offense of murder during the course of a first-degree robbery, in violation of § 13A 5 40(a)(2), *Ala. Code* 1975. At his arraignment, Sneed pleaded not guilty.[3] At trial, Sneed's defense was that, although he had participated in the robbery, he was not the gunman and he did not intend that anyone be killed.

II.

In his petition for certiorari review, Sneed presents 14 issues for our review; however, we address only the issue whether the trial court erred in admitting into evidence Sneed's edited and redacted statement. Because Sneed and Hardy were tried together, the prosecution did not introduce into evidence the complete statement Sneed gave to police officers, but instead, introduced his statement in an edited and redacted form. In the edited and redacted version of the statement, in places where Sneed had actually said "we" or "he," the prosecution had substituted "I," and in addition, it had eliminated all references to Hardy. The prosecution used

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[3] Sneed also pleaded not guilty by reason of mental disease or defect. However, Sneed withdrew this plea at trial following opening statements.

the edited and redacted statement in an effort to avoid violating Hardy's confrontation right guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution. See *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

In *Bruton*, the Supreme Court held that the admission of a non-testifying defendant's confession, implicating his codefendant in the crime, violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment. 391 U.S. at 126. See, also, *United States v. Lopez*, 898 F.2d 1505, 1510 (11th Cir.1990). However, in *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the Supreme Court limited its holding in *Bruton*, holding that the admission of a non-testifying defendant's confession does not violate the Confrontation Clause if the confession is redacted so as to eliminate the codefendant's name and any reference to his or her existence, and if the court gives the jury a proper limiting instruction. See *Richardson*, 481 U.S. at 208-09.

As previously noted, the State chose to try Sneed and Hardy together. In order to have the benefit of Sneed's statement in the case against him without violating Hardy's rights, the State, over Sneed's objection, had the edited and redacted statement admitted into evidence. His statement, as edited and redacted, put him in the role of a sole actor in the events leading up to the murder. The statement Sneed gave to police officers states:

> "On Sunday morning August 29, I was over at my friend Chris Hines House. Chris's girlfriend (Tanya Reed) was there with their kids. About a week before this we had planned to go to Alabama from Louisville, Kentucky. Anyhow Chris and his girlfriend got into an argument and

Chris said man I'm ready to go are your clothes ready I told him no and he took me home to get some clothes and me and Chris left coming to Alabama about 9:30 A.M. Eastern time. We arrived on Sunday the 29th of August about 3:30 PM. Central time, Alabama time. We drove to Mrs. Tina Gills place. That's were we had planned to stay because Chris's Mother didn't want Chris staying with his Daddy in Alabama because he was a bad influence. After we had been their a couple of days a tall fellow came over to Mrs. Gills his first name was John I don't remember his last name it was Hobby, Harbie or something like that. While we were there we went to A & M college, Huntsville, and to the Ebony Club in Triana. While we were at the Ebony Club John got into a fight. This was on friday night. We went back on Saturday night but we didn't have any trouble. On Labor Day we stayed around Mrs. Gills house. That night me and John ask Chris if we could use his car to make a liquor run. We went the county line and got a case of beer then we went to John's Mother's house and we got wasted on beer. Chris was at John's Mother's house when we borrowed the car. We got wasted drinking beer and John borrowed Chris's car again and me and him rode around. After a little while John said something about he shouldn't have let that guy take him. He was talking about the fight on friday night at the Ebony

Club. John drove over to his house and he got out of the car and left it running and told me to wait a minute. I just sat in the car and in minute or so John came out and he had a rifle with a scope on it. He laid it in the back seat. We drove off. I don't know where we went because I'm not from there. I remember we rode on a lot of dirt roads. I remember crossing a draw bridge over a river. After crossing the bridge John said lets go get some money. He meant go strong arm somebody. We drove pass a lot of gas stations, I remember we went by about six. Most of them had several people there and John kept saying lets go someplace else. Sometime between 12:00 midnight and 12:30 I saw a station that had only one guy in it. John drove around the block twice. We drove through the front of the store and looked inside. Then we drove back by the front and I saw the store clerk in the back by the Pop machines. I mean by the place were you open the doors to get the pop out. We parked on the side of the store. I forgot to say that after we drove by the first time we stopped and John started to take his shirt. I remember he tore the sleeves off his shirt we were going to use them for mask to cover our faces. When we drove by the front of the store the second time, we stopped and got out and as we walked to the front doors we tied the mask on our face. Then we went in the store. I opened the door the next thing I knew John threw

up the gun and started shooting. I ran pass John and tried to raise up the counter so I could get behind it but I couldn't get it up. I crawled under it. John leaned over the counter and the store clerk was trying to hide on the floor behind the counter John pointed the gun at the store clerk and he shot him in the shoulder. I was trying to get the cash register open. There was two cash registers but I couldn't get either one of them to open. John kept shooting the man. I heard about nine shots. John reached up under the counter and unplugged one of the cash registers and I picked it up and we both ran out of the store and go into Chris car which is a blue colored Ford LTD, 4 door. I not sure about the model but I think it's a 74. All I know for sure is its a 70's model. We drove back to Tanner and John hid the cash register in a wooded area and then John drove home and I drove Chris's car back to Mrs. Gills house. The next morning about 8:00 or 8:30 me and Chris drove over to John's house. John and his daddy was arguing about the rifle. The last time I saw the rifle John got it out of the car when I dropped him that night of the robbery. Sometime around 1:00 P.M. John told me to take my clothes off and burn them. He told me to get the gas can by the porch. I did and we poured the gas on my clothes and burned them. John had started burning his clothes before I got my clothes changed. Around 2:30

> P.M. we had left going over to John's mother's. John told Chris were to go and we drove and got the cash register. We all busted the cash register open, me, Chris and John. But we never told Chris where we had gotten the cash register or how we got it. We couldn't get the money drawer open and we had to shake it to get the money out. I remember we got $48.00 (forty eight dollars). Chris helped get the money out and John took all the money and we spent it all that on Beer and gas. All of this happened on Tuesday the day after Labor day. On Wednesday morning about 9:00 AM. we all left coming back to Louisville. Me, Chris and John. I never told Chris what happened and he never ask me. I have not seen Chris or John since I got back to Louisville about 2:30 PM Kentucky time when they dropped me off at my house. This statement was written by Sgt. Dwight Hale but the words and thoughts are my own and true to the best of my memory. I have made the statement of my own free will and no one force me to say anything."

State's Exhibit # 67 (misspelled and omitted words and grammatical and punctuation errors in original). However, the edited and redacted statement admitted into evidence at trial reads:

> "On Sunday morning, August 29, I was over at my friend Chris Hines' house. Chris's girlfriend, Tonya Reed, was there with their kids. About a week before this, we had planned to go to Alabama from

Louisville, Kentucky. Anyway, Chris and his girlfriend got into an argument and Chris said man I am ready to go, are your clothes ready? I told him no and he took me home to get some clothes and me and Chris left coming to Alabama about 9:30 a.m., eastern time. We arrived on Sunday, August 29, 1993, at about 3:30 p.m., central time, Alabama time. We drove to Ms. Tina Gill's place. That is where we planned to stay because Chris' mother did not want Chris to stay with his daddy in Alabama because he was a bad influence. While we were there, we went to A & M College, Huntsville into the Ebony club in Triana. We went back Saturday night, but we did not have any trouble. On labor day, we stayed around Ms. Gill's house. Chris was asked if his car could be used to make a liquor run. A case of beer was bought at the county line. I got wasted on beer. I rode around. I remember I rode on a lot of dirt roads. I remember crossing a draw bridge over a river. After crossing the bridge, I went past a lot of gas stations. I remember, I went by about 6. Most of them had several people there. Sometime between 12:00 midnight and 12:30 a.m., I saw a station that had only one guy in it. I went around the block twice. I went by the front of the store and I saw the store clerk in the back by the pop machines. I mean by the place where you open the doors to get the pop out. The car was parked on the side of the store. I used the sleeves

from a shirt for a mask to cover my face. When I went by the front of the store the second time, I got out and walked to the front door. I tied the mask on my face and I went in the store. I opened the door and the next thing I knew, the shooting started. I ran and tried to raise up the counter so I could get behind it, but I could not get it up. I crawled under it. I was trying to get the cash register open. There were two cash registers but I could not get either one of them to open. One of the cash registers, I picked up and ran out of the store and got in Chris' car which is a blue colored Ford LTD, 4 door. I am not sure about the model but I think it is a 74. All I know for sure is that it is a 70's model. I went back to Tanner and then I drove Chris' car back to Ms. Gill's house. I poured gas on my clothes and burned them. I went and got the cash register, busted it open, me and Chris, but I never told Chris where I had gotten the cash register or how I got it. I could not get the money drawer open and I had to shake it to get the money out. I remember, I got $48.00. Chris helped get the money out. We spent it all that night on beer and gas. All this happened on Tuesday, the day after labor day. On Wednesday morning, about 9:00 a.m., we left going back to Louisville, me and Chris. I never told Chris what happened and he never asked me. I have not seen Chris since I got back to Louisville about 2:30 p.m. Kentucky

> time when he dropped me off at my house."

State's Exhibit # 69 (omitted words and grammatical and punctuation errors in original).

Sneed's defense at trial was that he had participated in the robbery, but not the murder; that he was one of the people shown on the videotape, but he was not the gunman; and that he did not intend for anyone to be killed during the robbery. He argues that "[t]he redacted statement distorted the facts of the case and enlarged [his] role in the offense, effectively nullifying [his] defense that he lacked the specific intent to commit murder." The redaction of his statement was prejudicial, Sneed says, because the full statement was consistent with, and supportive of, his theory of the case, while the redacted statement was factually incorrect and made it appear that he alone had planned the robbery and was the sole active participant in it. Sneed maintains that the redaction in this case served to protect the rights of his codefendant, Hardy, while it distorted the facts presented to the jury; therefore, he concludes, the redaction was so prejudicial that the trial court should not have admitted it into evidence

Sneed also argues that the redaction of his statement violated the rule of completeness, i.e., the rule that "[c]onfessions or declarations, whether offered in evidence in a civil or criminal case, must be received as a whole." *Eiland v. State*, 52 Ala. 322, 335 (1875); accord *Levy v. State*, 49 Ala. 390, 393 (1873) ("The whole of a confession or admission must be given in evidence, and taken together; in other words, it must not be garbled."). Finally, Sneed points out that "[t]he right of cross examination, thorough and sifting, belongs to every party as to the witnesses called against him" (quoting § 12-21-137, *Ala. Code* 1975), and argues that the redaction of his

statement unlawfully limited his right to cross-examine the police officer who took the statement, because he could not ask the officer questions that elicited references to Hardy's involvement in the crime.

The State argues that the admission of the edited and redacted statement did not hamper Sneed's ability to put forth a defense because, it says, Sneed had the benefit of the videotape evidence from the store's surveillance camera, he had the opportunity to cross-examine two police officers, and the trial court instructed the jury that his statement, as introduced, was incomplete. The State also argues that the admission into evidence of the statement did not violate the rule of completeness, relying upon *United States v. Long*, 900 F.2d 1270, 1279 (8th Cir.1990). *Long* held that the rule requiring completeness of a statement by an accused does not apply when the meaning of a redacted statement is clear despite the redaction. The State's argument ignores the reality that the redaction in this case made a liar out of Sneed.

The jurors, who heard only the edited and redacted statement, heard Sneed describe himself as the central figure in the crime, without reference to the participation of anyone else in the events leading up to the murder, such as driving the car, obtaining the murder weapon, passing six gasoline stations before settling on the scene of the crime, or making a mask from shirt sleeves. It appears from the statement that Sneed drove the car, obtained the murder weapon, drove past six stations looking for the easiest target, devised the means of making the masks, and induced Hardy to carry the weapon into the store.

At trial, however, Sneed's theory of defense was irreconcilably inconsistent with the edited and redacted statement. Although the videotape evidence from the surveillance camera and Sneed's cross-examination of the

two officers supported his defense at trial, the videotape and the officers were incompetent witnesses as to the aforementioned events leading up to the murder. The videotape showed that Sneed was not acting alone and that Sneed was not the gunman; however, even though it provided a remarkable amount of evidence, it was simply unable to capture Sneed's intent at the time Sneed and Hardy entered the store. Evidence from the videotape and the officers does not overcome the distorted statement's contradiction of Sneed's defense that he lacked the specific intent to commit murder.

Although the police officers and the trial court told the jury that the edited and redacted statement was not Sneed's entire statement, its inconsistency with his defense at trial was not cured by so informing the jury. The police officers testified on cross-examination that Sneed had told them that he did not intend for anyone to die, that he was unarmed, and that he had no role in the murder. The State contends that the officers' testimony provides the "completeness" to the statement that was missing because of the redaction. However, that testimony contradicts the logical inference that Sneed's role in the offense, as described in the edited and redacted version of the statement made available to the jury, was primary. The jury could simply have believed that Sneed said one thing to the officers and another in his written statement.

The State recognizes in its brief that this Court has not previously addressed how the doctrine of completeness applies to a statement edited and redacted in accordance with *Richardson*, supra. Other jurisdictions have addressed this issue, however, as the Court of Criminal Appeals in its opinion and the State in its brief have noted. The United States Court of Appeals for the Second Circuit has acknowledged that a district

court, in deciding whether to redact portions of a defendant's statement, must balance its interest in protecting a codefendant's Sixth Amendment confrontation right against its interest in the judicial economy that is promoted by trying two or more defendants together. *United States v. Mussaleen*, 35 F.3d 692 (2d Cir.1994); *United States v. Castro*, 813 F.2d 571 (2d Cir.), *cert. denied*, 484 U.S. 844, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987). The Second Circuit has applied an abuse-of-discretion standard when reviewing a district court's balancing of these competing interests. *Mussaleen*, 35 F.3d at 696; *Castro*, 813 F.2d at 576. See, also, *State v. Mahboubian*, 74 N.Y.2d 174, 543 N.E.2d 34, 544 N.Y.S.2d 769 (1989) (the trial court's redaction of a statement and the denial of a severance were reviewed for abuse of discretion).

In *Mussaleen*, the district court had redacted portions of defendant McKinnon's pretrial statement in an effort to protect his codefendant Mussaleen's Sixth Amendment confrontation right. McKinnon argued that the redaction distorted his statement and that it violated the rule of completeness. The Second Circuit concluded that the redacted version of McKinnon's statement did not unfairly distort the original and did not exclude exculpatory information. The Second Circuit also concluded that because the redacted version of the statement conveyed the substance and context of the statement as a whole, it did not offend the rule of completeness. It found that the district court had not abused its discretion in redacting portions of McKinnon's statement. 35 F.3d at 696.

In *Castro*, the district court had redacted the portion of defendant Castro's statement that attributed the ownership of a bag of cocaine to a codefendant. The Second Circuit held that even though the meaning of

Castro's statement was changed "somewhat" by the redaction, the district court had not abused its discretion by redacting the statement and suggesting that on cross-examination of a law enforcement officer Castro could present to the jury the point that he denied ownership of the cocaine.

In *Mahboubian*, however, the Court of Appeals of New York found that Mahboubian had suffered undue prejudice as a result of the trial court's redaction of large portions of the statement he had made to police officers. Approximately 58 of 146 pages were redacted, eliminating all references to Mahboubian's codefendant Sakhai. In concluding that the trial court had abused its discretion by substantially redacting the statement, the Court of Appeals said that the redacted material "supported Mahboubian's defense arguments and if believed, it explained much of the evidence against him." 74 N.Y.2d at 188, 543 N.E.2d at 41, 544 N.Y.S.2d at 776.

The United States Court of Appeals for the District of Columbia Circuit has held that the "redaction of a confession violates the rule of completeness only if the redacted version 'distorts the meaning of the statement or excludes information substantially exculpatory of the defendant.'" See *United States v. Washington*, 952 F.2d 1402, 1404 (D.C.Cir.1991), *cert. denied*, 503 U.S. 1009, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992) (quoting *United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir.1982)). In *Washington*, however, the Court concluded that because the defendant was able to present during cross-examination the allegedly exculpatory material redacted from his statement, he was not denied " ' "a meaningful opportunity to present a complete defense." ' *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479,

485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984))." *Washington*, 952 F.2d at 1404.

We now apply the foregoing legal principles to the case before us. Sneed's jury would have had to conclude that the edited and redacted version of his statement admitted at trial was untruthful in order to accept his defense that he lacked the specific intent to commit murder. In this respect, Sneed's rights were sacrificed in order to accommodate the State's interest in conducting a joint trial.

It is axiomatic that an admissible confession is a voluntary statement by the defendant waiving his privilege under the Fifth Amendment to the United States Constitution against being compelled to be a witness against himself. The scope of the waiver must be measured by the words used in his voluntary act-i.e., his confession. Here, Sneed voluntarily gave a statement, but the State's significant and prejudicial alteration of the import of that statement effectively compelled his testimony as to matters to which he did not agree when he gave his statement.

We recognize that the trial court was attempting to perform the difficult task of balancing Sneed's right to offer his statement in support of his theory of defense, Hardy's Sixth Amendment right to confrontation, and the interest of judicial economy. In this instance, however, Sneed's statement was edited and redacted to the point that it was unduly prejudicial to him; therefore, the trial court abused its discretion in admitting into evidence Sneed's edited and redacted statement. Given the circumstances of this case, we conclude that Sneed is entitled to a new trial.

III.

We reverse the judgment of the Court of Criminal Appeals and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOUSTON, COOK,* LYONS, JOHNSTONE, and ENGLAND, JJ., concur.

HOOPER, C.J.,* and MADDOX, SEE, and BROWN, JJ., dissent.

SEE, Justice (dissenting).

Having reviewed the record in this case, I must respectfully dissent. I would affirm Sneed's conviction and sentence.

Rule 13.3(a)(1), *Ala.R.Crim.P.*, provides that "[t]wo or more offenses may be joined in an indictment, information, or complaint, if they ... [a]re of the same or similar character." Rule 13.4(a), *Ala.R.Crim.P.*, provides that "the court may order an election or separate trials of counts [or] grant a severance of defendants" when "it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants," but the preference for joint trials was stated in *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987):

> "It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements

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* Although Chief Justice Hooper and Justice Cook did not sit at oral argument of this case, they have listened to the tape of oral argument.

> exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."

(Footnote omitted.) Because of these benefits, the use of joint trials has been repeatedly approved. See *Zafiro v. United States*, 506 U.S. 534, 537, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993).

The preference for joint trials and the interests of judicial economy must be balanced against the court's interests in protecting a codefendant's right of confrontation. In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Supreme Court of the United States held that the admission into evidence of a nontestifying defendant's confession, implicating his codefendant in the crime, violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment. 391 U.S. at 126. See also *United States v. Lopez*, 898 F.2d 1505, 1510 (11th Cir.1990). However, in *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95

L.Ed.2d 176 (1987), the Supreme Court limited *Bruton*, holding that the admission of a nontestifying defendant's confession does not violate the Confrontation Clause if the confession is redacted to eliminate the codefendant's name and any reference to his existence, and the court gives the jury a proper limiting instruction. See *Richardson*, 481 U.S. at 208-09.

The decision to grant a severance lies within the broad discretion of the trial court, and such a decision will not be overturned absent an abuse of that discretion. See *Hill v. State*, 481 So.2d 419, 424 (Ala.Crim.App.1985); *Ex parte Washington*, 562 So.2d 1304, 1305 (Ala.1990); *Greathouse v. State*, 624 So.2d 202, 204 (Ala.Crim.App.1992). For a defendant to establish an abuse of discretion, he " 'must show that he "received an unfair trial and suffered compelling prejudice against which the trial court was unable to afford protection." ' " *Hill*, 481 So.2d at 424 (citations omitted).

> " 'It is only the most compelling prejudice, against which the trial court will not be able to afford protection, that will be sufficient to show the court abused its discretion in not granting a severance. Moreover, a defendant seeking to overturn a denial of severance must demonstrate specific prejudice which resulted from the denial. A mere showing of some prejudice is insufficient.' "

Minnis v. State, 690 So.2d 521, 525 (Ala.Crim.App.1996), quoting *Hinton v. State*, 548 So.2d 547, 555 (Ala.Crim.App.1988), *aff'd*, 548 So.2d 562 (Ala.), *cert. denied*, 493 U.S. 969, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989) (citations omitted).

Although Sneed's original statement was altered by the redaction, the substance of the redacted material was presented to the jury through the testimony of other witnesses, through demonstrative evidence, and through facts elicited on cross-examination. Sneed's defense was that, although he was aware that he and Hardy were going to rob the convenience store, he did not intend for anyone to die. His defense was presented to the jury through the surveillance camera videotape and through Sneed's cross-examination of Officers Boyd and Hale. The video showed that Sneed was not acting alone and that Sneed was not the gunman. The trial court provided Sneed with wide latitude on cross- examination of the State's witnesses. On cross-examination, Officers Boyd and Hale testified that the statement admitted into evidence was not Sneed's entire statement; that Sneed told them that he had not intended for anyone to die; and that he was unarmed and had had no role in the murder. Moreover, the trial court instructed the jury that the redacted statement was not Sneed's entire statement. Based on the foregoing evidence, I cannot conclude that Sneed's ability to put forth a defense was hampered.

Sneed also argues that the admission of the redacted statement violated the rule of completeness. The general rule on this issue is that "when part of a defendant's post-arrest statement is introduced into evidence, the defendant has the right to have the entire statement introduced." *United States v. Smith*, 794 F.2d 1333, 1335 (8th Cir.1986); see also *Bridges v. State*, 516 So.2d 895 (Ala.Crim.App.1987). This rule, however, is not absolute. When a defendant's confession is redacted to avoid violating the Sixth Amendment rights of a codefendant, " 'the rule of completeness is violated, and severance required, only where admission of the statement in its edited form distorts the meaning of the statement or excludes information substantially

exculpatory of the declarant.' " *United States v. Long*, 900 F.2d 1270, 1279 (8th Cir.1990), quoting *United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir.1982). See also *United States v. Smith*, 794 F.2d 1333, 1335 (8th Cir.1986); *United States v. Lopez*, 898 F.2d 1505, 1510 n. 11 (11th Cir.1990). Although the redaction did edit Sneed's statement, the meaning of that statement became apparent through the testimony of witnesses, both on direct and on cross- examination, and through demonstrative evidence, including the surveillance videotape of the crime. "The rule of completeness is not violated when the meaning of the redacted statement becomes clear despite the redaction." *Long*, 900 F.2d at 1279.

Finally, Sneed argues that the admission of the redacted statement limited his ability to cross-examine witnesses. I do not find this argument persuasive, given the wide latitude afforded Sneed by the trial court.

After examining both Sneed's arguments and the record, and after reviewing the trial court's balancing of the competing interests of protecting a codefendant's confrontation right against the interest in judicial economy, I would hold that the trial court did not abuse its discretion in admitting into evidence Sneed's redacted statement. The admission of the redacted statement did not hamper Sneed's ability to put on his defense, did not violate the rule of completeness, and did not limit his ability to cross-examine witnesses.

HOOPER, C.J., and MADDOX, J., concur.

BROWN, Justice (dissenting).

I dissent not only for the reasons stated in Justice See's dissent, but also because I believe Judge Patterson was correct in his statement regarding harmless error:

> "Moreover, in this case, even if the admission of Sneed's redacted statement was erroneous, it would not mandate reversal; the evidence of guilt of the capital crime charged was so overwhelming that any error in this regard would have been harmless. If error occurred, it could not have had an injurious effect or influence on the jury's verdict nor could it have injuriously affected Sneed's substantial rights."

Sneed v. State, [Ms. CR-95-0587, April 30, 1999] ___ So.2d ___, ___ (Ala.Crim.App.1999) (footnote omitted).

I would therefore affirm Sneed's capital-murder conviction and the sentence.

On Application for Rehearing

PER CURIAM.

APPLICATION OVERRULED; OPINION OF JUNE 30, 2000, MODIFIED.

HOUSTON, COOK, LYONS, JOHNSTONE, and ENGLAND, JJ., concur.

HOOPER, C.J., and MADDOX, SEE, and BROWN, JJ., dissent.

HOOPER, Chief Justice (dissenting).

I must respectfully dissent. The majority concludes that "the redaction in this case made a liar out of Sneed," ___ So.2d at ___, and prevented him from effectively presenting the defense that he lacked the specific intent to kill. However, the redaction did not make a liar out of Sneed. The evidence did. Aside from the allegedly improperly redacted statement, the videotape from the security camera, the testimony from

Sneed's cross-examination of the two police officers who recorded his original statement, and the trial court's instruction to the jury that the statement, as introduced in its redacted form into evidence, was not his original, complete declaration provided ample opportunity for Sneed to present his defense. It was solely for the consideration of the jury, which heard firsthand the testimony, observed the evidence, and witnessed the events as they unfolded in the courtroom, to weigh that evidence accordingly; this Court is wrong to question the jury's determination in that regard.

My conclusion in this particular case does not undermine my firm belief that the state should be especially careful when redacting an accused's statement-- especially as in the instant case, where pronouns are "blanketly" substituted to omit any mention of a coconspirator--lest it accidentally omit proof of the substantive elements of an offense. However, in this case, any error that may have inadvertently occurred in the admission of the redacted statement into evidence could be interpreted as harmless in light of the other, significant evidence presented by the state, which could have been interpreted by the jury as negating Sneed's defense that he lacked the specific intent to kill.

I would, therefore, affirm the judgment of the Court of Criminal Appeals affirming Sneed's capital-murder conviction and his sentence.

SUPREME COURT OF ALABAMA

EX PARTE ULYSSES CHARLES SNEED

(In Re Ulysses Charles Sneed v. State)
1981660
June 30, 2000

MODIFIED ON REHEARING SEPTEMBER 15, 2000

PER CURIAM

Ulysses Charles Sneed was convicted of capital murder for the killing of Clarence Nugene Terry. The murder was made capital because it was committed during the course of a robbery in the first degree. See § 13A-5-40(a)(2), *Ala. Code* 1975. Sneed was tried with a codefendant, John Milton Hardy; Hardy also was convicted of capital murder.[1] The jury, by a vote of 10-2, recommended that Sneed be sentenced to death by electrocution. The trial court, after independently weighing the aggravating and mitigating factors, concurred with the jury's recommendation and sentenced Sneed to death.[2]

The Court of Criminal Appeals affirmed Sneed's conviction and sentence. See *Sneed v. State*, [Ms. CR-95-0587, April 30, 1999] ___ So.2d ___ (Ala.Crim.App.1999). This Court granted Sneed's petition for certiorari review. Because we find that the trial court erred in admitting

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[1] See *Hardy v. State*, [Ms. CR-95-0589, March 26, 1999] ___ So. 2nd ___ (Ala. Crim. App. 1999). Hardy's case is pending before this Court on certiorari review (no. 1981646).

[2] By the same vote of 10-2, the jury recommended that Hardy be sentenced to death. The trial court also concurred with the jury's recommendation as to Hardy and sentenced him to death.

into evidence an edited and redacted version of a statement that Sneed had made to police officers, we reverse and remand.

I.

The evidence presented at trial indicated the following facts. On August 29, 1993, Sneed and Chris Hines drove from Louisville, Kentucky, to Alabama. The two men came to Alabama to look for jobs. Sneed stayed with Hines and Hardy, who is Hines's cousin. In the early morning hours of September 7, 1993, Sneed and Hardy borrowed Hines's automobile and went to buy beer; Hardy was driving and Sneed was a passenger. Hardy drove to his house, where he picked up a rifle and put it in the car. He then drove to Bud's Convenience Store in Decatur. Hardy pulled his shirt sleeves from his shirt, and Hardy and Sneed tied the sleeves around their faces as masks. Sneed opened the door to the convenience store. Hardy stepped into the store and began firing his rifle at Terry, the store clerk. Hardy's first shot missed Terry, who tried to hide behind the counter. As Hardy fired at Terry, Sneed ran behind the counter toward the cash register. While Sneed attempted to open the cash register, Hardy leaned over the counter and shot Terry in the chest. Hardy then walked around the counter and shot Terry five times in the head and face. While Terry lay dying on the floor, Sneed and Hardy continued their attempt to open the cash register; they were unsuccessful. Sneed and Hardy unplugged the cash register and took it with them as they ran from the store. These events were recorded on the convenience store's surveillance video camera.

Later that morning, Sneed, Hardy, and Hines went to Hardy's father's house, where Sneed and Hardy had left the cash register. Using a sledgehammer, the three men tried to open the register. When the police recovered

the cash register, they found Hines's fingerprint on it. The police showed the surveillance video to several people, including Hines. Four of those people, including Hines, identified Hardy as the shooter and Sneed as the unarmed man.

In his statement to police, Sneed admitted that he had participated in the robbery, but stated that he did not intend for anyone to get hurt. The indictment against Sneed alleged that he had committed the capital offense of murder during the course of a first-degree robbery, in violation of § 13A 5 40(a)(2), *Ala. Code* 1975. At his arraignment, Sneed pleaded not guilty.[3] At trial, Sneed's defense was that, although he had participated in the robbery, he was not the gunman and he did not intend that anyone be killed.

II.

In his petition for certiorari review, Sneed presents 14 issues for our review; however, we address only the issue whether the trial court erred in admitting into evidence Sneed's edited and redacted statement. Because Sneed and Hardy were tried together, the prosecution did not introduce into evidence the complete statement Sneed gave to police officers, but instead, introduced his statement in an edited and redacted form. In the edited and redacted version of the statement, in places where Sneed had actually said "we" or "he," the prosecution had substituted "I," and in addition, it had eliminated all references to Hardy. The prosecution used the edited and redacted statement in an effort to avoid violating Hardy's confrontation right guaranteed by the

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[3] Sneed also pleaded not guilty by reason of mental disease or defect. However, Sneed withdrew this plea at trial following opening statements.

Confrontation Clause of the Sixth Amendment to the United States Constitution. See *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

In *Bruton*, the Supreme Court held that the admission of a non-testifying defendant's confession, implicating his codefendant in the crime, violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment. 391 U.S. at 126. See, also, *United States v. Lopez*, 898 F.2d 1505, 1510 (11th Cir.1990). However, in *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the Supreme Court limited its holding in *Bruton*, holding that the admission of a non-testifying defendant's confession does not violate the Confrontation Clause if the confession is redacted so as to eliminate the codefendant's name and any reference to his or her existence, and if the court gives the jury a proper limiting instruction. See *Richardson*, 481 U.S. at 208-09.

As previously noted, the State chose to try Sneed and Hardy together. In order to have the benefit of Sneed's statement in the case against him without violating Hardy's rights, the State, over Sneed's objection, had the edited and redacted statement admitted into evidence. His statement, as edited and redacted, put him in the role of a sole actor in the events leading up to the murder. The statement Sneed gave to police officers states:

> "On Sunday morning August 29, I was over at my friend Chris Hines House. Chris's girlfriend (Tanya Reed) was there with their kids. About a week before this we had planned to go to Alabama from Louisville, Kentucky. Anyhow Chris and his girlfriend got into an argument and Chris said man I'm ready to go are your clothes ready I told him no and he took

me home to get some clothes and me and Chris left coming to Alabama about 9:30 A.M. Eastern time. We arrived on Sunday the 29th of August about 3:30 PM. Central time, Alabama time. We drove to Mrs. Tina Gills place. That's were we had planned to stay because Chris's Mother didn't want Chris staying with his Daddy in Alabama because he was a bad influence. After we had been their a couple of days a tall fellow came over to Mrs. Gills his first name was John I don't remember his last name it was Hobby, Harbie or something like that. While we were there we went to A & M college, Huntsville, and to the Ebony Club in Triana. While we were at the Ebony Club John got into a fight. This was on friday night. We went back on Saturday night but we didn't have any trouble. On Labor Day we stayed around Mrs. Gills house. That night me and John ask Chris if we could use his car to make a liquor run. We went the county line and got a case of beer then we went to John's Mother's house and we got wasted on beer. Chris was at John's Mother's house when we borrowed the car. We got wasted drinking beer and John borrowed Chris's car again and me and him rode around. After a little while John said something about he shouldn't have let that guy take him. He was talking about the fight on friday night at the Ebony Club. John drove over to his house and he got out of the car and left it running and

told me to wait a minute. I just sat in the car and in minute or so John came out and he had a rifle with a scope on it. He laid it in the back seat. We drove off. I don't know where we went because I'm not from there. I remember we rode on a lot of dirt roads. I remember crossing a draw bridge over a river. After crossing the bridge John said lets go get some money. He meant go strong arm somebody. We drove pass a lot of gas stations, I remember we went by about six. Most of them had several people there and John kept saying lets go someplace else. Sometime between 12:00 midnight and 12:30 I saw a station that had only one guy in it. John drove around the block twice. We drove through the front of the store and looked inside. Then we drove back by the front and I saw the store clerk in the back by the Pop machines. I mean by the place were you open the doors to get the pop out. We parked on the side of the store. I forgot to say that after we drove by the first time we stopped and John started to take his shirt. I remember he tore the sleeves off his shirt we were going to use them for mask to cover our faces. When we drove by the front of the store the second time, we stopped and got out and as we walked to the front doors we tied the mask on our face. Then we went in the store. I opened the door the next thing I knew John threw up the gun and started shooting. I ran pass John and tried to raise up the

counter so I could get behind it but I couldn't get it up. I crawled under it. John leaned over the counter and the store clerk was trying to hide on the floor behind the counter John pointed the gun at the store clerk and he shot him in the shoulder. I was trying to get the cash register open. There was two cash registers but I couldn't get either one of them to open. John kept shooting the man. I heard about nine shots. John reached up under the counter and unplugged one of the cash registers and I picked it up and we both ran out of the store and go into Chris car which is a blue colored Ford LTD, 4 door. I not sure about the model but I think it's a 74. All I know for sure is its a 70's model. We drove back to Tanner and John hid the cash register in a wooded area and then John drove home and I drove Chris's car back to Mrs. Gills house. The next morning about 8:00 or 8:30 me and Chris drove over to John's house. John and his daddy was arguing about the rifle. The last time I saw the rifle John got it out of the car when I dropped him that night of the robbery. Sometime around 1:00 P.M. John told me to take my clothes off and burn them. He told me to get the gas can by the porch. I did and we poured the gas on my clothes and burned them. John had started burning his clothes before I got my clothes changed. Around 2:30 P.M. we had left going over to John's mother's. John told Chris were to go and

we drove and got the cash register. We all busted the cash register open, me, Chris and John. But we never told Chris where we had gotten the cash register or how we got it. We couldn't get the money drawer open and we had to shake it to get the money out. I remember we got $48.00 (forty eight dollars). Chris helped get the money out and John took all the money and we spent it all that on Beer and gas. All of this happened on Tuesday the day after Labor day. On Wednesday morning about 9:00 AM. we all left coming back to Louisville. Me, Chris and John. I never told Chris what happened and he never ask me. I have not seen Chris or John since I got back to Louisville about 2:30 PM Kentucky time when they dropped me off at my house. This statement was written by Sgt. Dwight Hale but the words and thoughts are my own and true to the best of my memory. I have made the statement of my own free will and no one force me to say anything."

State's Exhibit # 67 (misspelled and omitted words and grammatical and punctuation errors in original). However, the edited and redacted statement admitted into evidence at trial reads:

"On Sunday morning, August 29, I was over at my friend Chris Hines' house. Chris's girlfriend, Tonya Reed, was there with their kids. About a week before this, we had planned to go to Alabama from Louisville, Kentucky. Anyway, Chris and his girlfriend got into an argument and

Chris said man I am ready to go, are your clothes ready? I told him no and he took me home to get some clothes and me and Chris left coming to Alabama about 9:30 a.m., eastern time. We arrived on Sunday, August 29, 1993, at about 3:30 p.m., central time, Alabama time. We drove to Ms. Tina Gill's place. That is where we planned to stay because Chris' mother did not want Chris to stay with his daddy in Alabama because he was a bad influence. While we were there, we went to A & M College, Huntsville into the Ebony club in Triana. We went back Saturday night, but we did not have any trouble. On labor day, we stayed around Ms. Gill's house. Chris was asked if his car could be used to make a liquor run. A case of beer was bought at the county line. I got wasted on beer. I rode around. I remember I rode on a lot of dirt roads. I remember crossing a draw bridge over a river. After crossing the bridge, I went past a lot of gas stations. I remember, I went by about 6. Most of them had several people there. Sometime between 12:00 midnight and 12:30 a.m., I saw a station that had only one guy in it. I went around the block twice. I went by the front of the store and I saw the store clerk in the back by the pop machines. I mean by the place where you open the doors to get the pop out. The car was parked on the side of the store. I used the sleeves from a shirt for a mask to cover my face. When I went by the front of the store the

second time, I got out and walked to the front door. I tied the mask on my face and I went in the store. I opened the door and the next thing I knew, the shooting started. I ran and tried to raise up the counter so I could get behind it, but I could not get it up. I crawled under it. I was trying to get the cash register open. There were two cash registers but I could not get either one of them to open. One of the cash registers, I picked up and ran out of the store and got in Chris' car which is a blue colored Ford LTD, 4 door. I am not sure about the model but I think it is a 74. All I know for sure is that it is a 70's model. I went back to Tanner and then I drove Chris' car back to Ms. Gill's house. I poured gas on my clothes and burned them. I went and got the cash register, busted it open, me and Chris, but I never told Chris where I had gotten the cash register or how I got it. I could not get the money drawer open and I had to shake it to get the money out. I remember, I got $48.00. Chris helped get the money out. We spent it all that night on beer and gas. All this happened on Tuesday, the day after labor day. On Wednesday morning, about 9:00 a.m., we left going back to Louisville, me and Chris. I never told Chris what happened and he never asked me. I have not seen Chris since I got back to Louisville about 2:30 p.m. Kentucky time when he dropped me off at my house."

State's Exhibit # 69 (omitted words and grammatical and punctuation errors in original).

Sneed's defense at trial was that he had participated in the robbery, but not the murder; that he was one of the people shown on the videotape, but he was not the gunman; and that he did not intend for anyone to be killed during the robbery. He argues that "[t]he redacted statement distorted the facts of the case and enlarged [his] role in the offense, effectively nullifying [his] defense that he lacked the specific intent to commit murder." The redaction of his statement was prejudicial, Sneed says, because the full statement was consistent with, and supportive of, his theory of the case, while the redacted statement was factually incorrect and made it appear that he alone had planned the robbery and was the sole active participant in it. Sneed maintains that the redaction in this case served to protect the rights of his codefendant, Hardy, while it distorted the facts presented to the jury; therefore, he concludes, the redaction was so prejudicial that the trial court should not have admitted it into evidence.

Sneed also argues that the redaction of his statement violated the rule of completeness, i.e., the rule that "[c]onfessions or declarations, whether offered in evidence in a civil or criminal case, must be received as a whole." *Eiland v. State*, 52 Ala. 322, 335 (1875); accord *Levy v. State*, 49 Ala. 390, 393 (1873) ("The whole of a confession or admission must be given in evidence, and taken together; in other words, it must not be garbled."). Finally, Sneed points out that "[t]he right of cross examination, thorough and sifting, belongs to every party as to the witnesses called against him" (quoting § 12-21-137, *Ala. Code* 1975), and argues that the redaction of his statement unlawfully limited his right to cross-examine the police officer who took the statement, because he

could not ask the officer questions that elicited references to Hardy's involvement in the crime.

The State argues that the admission of the edited and redacted statement did not hamper Sneed's ability to put forth a defense because, it says, Sneed had the benefit of the videotape evidence from the store's surveillance camera, he had the opportunity to cross-examine two police officers, and the trial court instructed the jury that his statement, as introduced, was incomplete. The State also argues that the admission into evidence of the statement did not violate the rule of completeness, relying upon *United States v. Long*, 900 F.2d 1270, 1279 (8th Cir.1990). *Long* held that the rule requiring completeness of a statement by an accused does not apply when the meaning of a redacted statement is clear despite the redaction. The State's argument, which relies on authority dealing with the separate issue of protecting a conspirator from incrimination through an admission by a nontestifying codefendant, ignores the reality that the redaction in this case made a liar out of Sneed.

The jurors, who heard only the edited and redacted statement, heard Sneed describe himself as the central figure in the crime, without reference to the participation of anyone else in the events leading up to the murder, such as driving the car, obtaining the murder weapon, passing six gasoline stations before settling on the scene of the crime, or making a mask from shirt sleeves. It appears from the statement that Sneed drove the car, obtained the murder weapon, drove past six stations looking for the easiest target, devised the means of making the masks, and induced Hardy to carry the weapon into the store.

At trial, however, Sneed's theory of defense was irreconcilably inconsistent with the edited and redacted statement. Although the videotape evidence from the

surveillance camera and Sneed's cross-examination of the two officers supported his defense at trial, the videotape and the officers were incompetent witnesses as to the aforementioned events leading up to the murder. The videotape showed that Sneed was not acting alone and that Sneed was not the gunman; however, even though it provided a remarkable amount of evidence, it was simply unable to capture Sneed's intent at the time Sneed and Hardy entered the store. Evidence from the videotape and the officers does not overcome the distorted statement's contradiction of Sneed's defense that he lacked the specific intent to commit murder.

Although the police officers and the trial court told the jury that the edited and redacted statement was not Sneed's entire statement, its inconsistency with his defense at trial was not cured by so informing the jury. The police officers testified on cross-examination that Sneed had told them that he did not intend for anyone to die, that he was unarmed, and that he had no role in the murder. The State contends that the officers' testimony provides the "completeness" to the statement that was missing because of the redaction. However, that testimony contradicts the logical inference that Sneed's role in the offense, as described in the edited and redacted version of the statement made available to the jury, was primary. The jury could simply have believed that Sneed said one thing to the officers and another in his written statement.

The State recognizes in its brief that this Court has not previously addressed how the doctrine of completeness applies to a statement edited and redacted in accordance with *Richardson*, supra. Other jurisdictions have addressed this issue, however, as the Court of Criminal Appeals in its opinion and the State in its brief have noted. The United States Court of Appeals

for the Second Circuit has acknowledged that a district court, in deciding whether to redact portions of a defendant's statement, must balance its interest in protecting a codefendant's Sixth Amendment confrontation right against its interest in the judicial economy that is promoted by trying two or more defendants together. *United States v. Mussaleen*, 35 F.3d 692 (2d Cir.1994); *United States v. Castro*, 813 F.2d 571 (2d Cir.), *cert. denied*, 484 U.S. 844, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987). The Second Circuit has applied an abuse-of-discretion standard when reviewing a district court's balancing of these competing interests. *Mussaleen*, 35 F.3d at 696; *Castro*, 813 F.2d at 576. See, also, *State v. Mahboubian*, 74 N.Y.2d 174, 543 N.E.2d 34, 544 N.Y.S.2d 769 (1989) (the trial court's redaction of a statement and the denial of a severance were reviewed for abuse of discretion).

In *Mussaleen*, the district court had redacted portions of defendant McKinnon's pretrial statement in an effort to protect his codefendant Mussaleen's Sixth Amendment confrontation right. McKinnon argued that the redaction distorted his statement and that it violated the rule of completeness. The Second Circuit concluded that the redacted version of McKinnon's statement did not unfairly distort the original and did not exclude exculpatory information. The Second Circuit also concluded that because the redacted version of the statement conveyed the substance and context of the statement as a whole, it did not offend the rule of completeness. It found that the district court had not abused its discretion in redacting portions of McKinnon's statement. 35 F.3d at 696.

In *Castro*, the district court had redacted the portion of defendant Castro's statement that attributed the ownership of a bag of cocaine to a codefendant. The

Second Circuit held that even though the meaning of Castro's statement was changed "somewhat" by the redaction, the district court had not abused its discretion by redacting the statement and suggesting that on cross-examination of a law enforcement officer Castro could present to the jury the point that he denied ownership of the cocaine.

In *Mahboubian*, however, the Court of Appeals of New York found that Mahboubian had suffered undue prejudice as a result of the trial court's redaction of large portions of the statement he had made to police officers. Approximately 58 of 146 pages were redacted, eliminating all references to Mahboubian's codefendant Sakhai. In concluding that the trial court had abused its discretion by substantially redacting the statement, the Court of Appeals said that the redacted material "supported Mahboubian's defense arguments and if believed, it explained much of the evidence against him." 74 N.Y.2d at 188, 543 N.E.2d at 41, 544 N.Y.S.2d at 776.

The United States Court of Appeals for the District of Columbia Circuit has held that the "redaction of a confession violates the rule of completeness only if the redacted version 'distorts the meaning of the statement or excludes information substantially exculpatory of the defendant.'" See *United States v. Washington*, 952 F.2d 1402, 1404 (D.C.Cir.1991), *cert. denied*, 503 U.S. 1009, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992) (quoting *United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir.1982)). In *Washington*, however, the Court concluded that because the defendant was able to present during cross-examination the allegedly exculpatory material redacted from his statement, he was not denied " ' "a meaningful opportunity to present a complete defense." ' *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479,

485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984))." *Washington*, 952 F.2d at 1404.

We now apply the foregoing legal principles to the case before us. Sneed's jury would have had to conclude that the edited and redacted version of his statement admitted at trial was untruthful in order to accept his defense that he lacked the specific intent to commit murder. In this respect, Sneed's rights were sacrificed in order to accommodate the State's interest in conducting a joint trial. It is axiomatic that an admissible confession is a voluntary statement by the defendant, notwithstanding his privilege under the Fifth Amendment to the United States Constitution against being compelled to be a witness against himself. The scope of the waiver must be measured by his voluntary act. Here, Sneed voluntarily gave a statement; the significant alteration in its import effectively compelled his testimony as to matters to which he did not agree when he gave his statement.

We recognize that the trial court was attempting to perform the difficult task of balancing Sneed's right to offer his statement in support of his theory of defense, Hardy's Sixth Amendment right to confrontation, and the interest of judicial economy. In this instance, however, Sneed's statement was edited and redacted to the point that it was unduly prejudicial to him; therefore, the trial court abused its discretion in admitting into evidence Sneed's edited and redacted statement. Given the circumstances of this case, we conclude that Sneed is entitled to a new trial.

III.

We reverse the judgment of the Court of Criminal Appeals and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOUSTON, COOK,* LYONS, JOHNSTONE, and ENGLAND, JJ., concur.

HOOPER, C.J.,* and MADDOX, SEE, and BROWN, JJ., dissent.

SEE, Justice (dissenting).

Having reviewed the record in this case, I must respectfully dissent. I would affirm Sneed's conviction and sentence.

Rule 13.3(a)(1), *Ala.R.Crim.P.*, provides that "[t]wo or more offenses may be joined in an indictment, information, or complaint, if they ... [a]re of the same or similar character." Rule 13.4(a), *Ala.R.Crim.P.*, provides that "the court may order an election or separate trials of counts [or] grant a severance of defendants" when "it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants," but the preference for joint trials was stated in *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987):

> "It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage

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* Although Chief Justice Hooper and Justice Cook did not sit at oral argument of this case, they have listened to the tape of oral argument.

> of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."

(Footnote omitted.) Because of these benefits, the use of joint trials has been repeatedly approved. See *Zafiro v. United States*, 506 U.S. 534, 537, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993).

The preference for joint trials and the interests of judicial economy must be balanced against the court's interests in protecting a codefendant's right of confrontation. In *Bruton v. United States*, 391 U.S. 123, (1968), the Supreme Court of the United States held that the admission into evidence of a nontestifying defendant's confession, implicating his codefendant in the crime, violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment. 391 U.S. at 126. See also *United States v. Lopez*, 898 F.2d 1505, 1510 (11th Cir.1990). However, in *Richardson v. Marsh*, 481 U.S. 200 (1987), the Supreme Court limited *Bruton*, holding that the admission of a nontestifying defendant's confession does not violate the Confrontation Clause if the confession is redacted to eliminate the codefendant's name and any reference to his existence, and the court gives the jury a proper limiting instruction. See *Richardson*, 481 U.S. at 208-09.

The decision to grant a severance lies within the broad discretion of the trial court, and such a decision will not be overturned absent an abuse of that discretion. See *Hill v. State*, 481 So.2d 419, 424 (Ala.Crim.App.1985); *Ex parte Washington*, 562 So.2d 1304, 1305 (Ala.1990); *Greathouse v. State*, 624 So.2d 202, 204 (Ala.Crim.App.1992). For a defendant to establish an abuse of discretion, he " 'must show that he "received an unfair trial and suffered compelling prejudice against which the trial court was unable to afford protection." ' " *Hill*, 481 So.2d at 424 (citations omitted).

> " 'It is only the most compelling prejudice, against which the trial court will not be able to afford protection, that will be sufficient to show the court abused its discretion in not granting a severance. Moreover, a defendant seeking to overturn a denial of severance must demonstrate specific prejudice which resulted from the denial. A mere showing of some prejudice is insufficient.' "

Minnis v. State, 690 So.2d 521, 525 (Ala.Crim.App.1996), quoting *Hinton v. State*, 548 So.2d 547, 555 (Ala.Crim.App.1988), *aff'd*, 548 So.2d 562 (Ala.), *cert. denied*, 493 U.S. 969 (1989) (citations omitted).

Although Sneed's original statement was altered by the redaction, the substance of the redacted material was presented to the jury through the testimony of other witnesses, through demonstrative evidence, and through facts elicited on cross-examination. Sneed's defense was that, although he was aware that he and Hardy were going to rob the convenience store, he did not intend for anyone to die. His defense was presented to the jury through the surveillance camera videotape and through Sneed's cross-examination of Officers Boyd and Hale. The

video showed that Sneed was not acting alone and that Sneed was not the gunman. The trial court provided Sneed with wide latitude on cross- examination of the State's witnesses. On cross-examination, Officers Boyd and Hale testified that the statement admitted into evidence was not Sneed's entire statement; that Sneed told them that he had not intended for anyone to die; and that he was unarmed and had had no role in the murder. Moreover, the trial court instructed the jury that the redacted statement was not Sneed's entire statement. Based on the foregoing evidence, I cannot conclude that Sneed's ability to put forth a defense was hampered.

Sneed also argues that the admission of the redacted statement violated the rule of completeness. The general rule on this issue is that "when part of a defendant's post-arrest statement is introduced into evidence, the defendant has the right to have the entire statement introduced." *United States v. Smith*, 794 F.2d 1333, 1335 (8th Cir.1986); see also *Bridges v. State*, 516 So.2d 895 (Ala.Crim.App.1987). This rule, however, is not absolute. When a defendant's confession is redacted to avoid violating the Sixth Amendment rights of a codefendant, " 'the rule of completeness is violated, and severance required, only where admission of the statement in its edited form distorts the meaning of the statement or excludes information substantially exculpatory of the declarant.' " *United States v. Long*, 900 F.2d 1270, 1279 (8th Cir.1990), quoting *United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir.1982). See also *United States v. Smith*, 794 F.2d 1333, 1335 (8th Cir.1986); *United States v. Lopez*, 898 F.2d 1505, 1510 n. 11 (11th Cir.1990). Although the redaction did edit Sneed's statement, the meaning of that statement became apparent through the testimony of witnesses, both on direct and on cross- examination, and through demonstrative evidence, including the surveillance

videotape of the crime. "The rule of completeness is not violated when the meaning of the redacted statement becomes clear despite the redaction." *Long*, 900 F.2d at 1279.

Finally, Sneed argues that the admission of the redacted statement limited his ability to cross-examine witnesses. I do not find this argument persuasive, given the wide latitude afforded Sneed by the trial court.

After examining both Sneed's arguments and the record, and after reviewing the trial court's balancing of the competing interests of protecting a codefendant's confrontation right against the interest in judicial economy, I would hold that the trial court did not abuse its discretion in admitting into evidence Sneed's redacted statement. The admission of the redacted statement did not hamper Sneed's ability to put on his defense, did not violate the rule of completeness, and did not limit his ability to cross-examine witnesses.

HOOPER, C.J., and MADDOX, J., concur.

BROWN, Justice (dissenting).

I dissent not only for the reasons stated in Justice See's dissent, but also because I believe Judge Patterson was correct in his statement regarding harmless error:

> "Moreover, in this case, even if the admission of Sneed's redacted statement was erroneous, it would not mandate reversal; the evidence of guilt of the capital crime charged was so overwhelming that any error in this regard would have been harmless. If error occurred, it could not have had an injurious effect or influence on the jury's

> verdict nor could it have injuriously affected Sneed's substantial rights."

Sneed v. State, [Ms. CR-95-0587, April 30, 1999] ___ So.2d ___, ___ (Ala.Crim.App.1999) (footnote omitted).

I would therefore affirm Sneed's capital-murder conviction and the sentence.

COURT OF CRIMINAL APPEALS OF ALABAMA.

ULYSSES CHARLES SNEED

V.

STATE.

CR-95-0587.

April 30, 1999.

PATTERSON, Retired Appellate Judge.

The appellant, Ulysses Charles Sneed, was indicted jointly with John Milton Hardy on October 22, 1993, in Morgan County, for the capital offense of murder committed during a robbery in the first degree. See *Ala. Code* 1975, § 13A-5-40(a)(2). (For the particular facts of Hardy's prosecution, see *Hardy v. State*, [Ms. CR-95-0589, March 26, 1999] ___ So.2d ___ (Ala.Crim.App.1999)).

At arraignment, Sneed pleaded not guilty and not guilty by reason of mental disease or defect. At the conclusion of opening statements at trial, he withdrew his plea of not guilty by reason of mental disease or defect. On October 27, 1995, after a joint trial, a jury found Sneed guilty of the capital offense charged in the indictment. On October 30, 1995, after a joint sentencing hearing before the jury, § 13A-5-46, the jury recommended, by a vote of 10 to 2, that Sneed be sentenced to death. On December 21, 1995, the trial court held another joint sentencing hearing, § 13A-5-47, and heard testimony and arguments concerning information in the presentence investigation report and the existence of aggravating circumstances and mitigating circumstances. Thereafter, the trial court determined that two aggravating circumstances existed in specific regard to Sneed: (1) that the murder was

committed during the course of a robbery, § 13A-5-49(4); and (2) that the murder was especially heinous, atrocious, or cruel when compared to other capital offenses, § 13A-5-49(8). The court determined that three statutory mitigating circumstances existed: (1) that Sneed had no significant history of prior criminal activity, § 13A-5-51(1); (2) Sneed was an accomplice in the capital offense committed by Hardy, § 13A-5-51(4);[1] and (3) Sneed's age (23 years old) at the time of the crime, § 13A-5-51(7). The court further determined that two nonstatutory mitigating circumstances existed: (1) Sneed had a family, i.e, three children, three siblings, and his mother, by whom he was primarily raised; and (2) Sneed's character and his remorsefulness for the murder. Based upon the evidence presented at trial, the evidence presented during the sentencing hearings, the presentence investigation report, the recommendation of the jury, and its finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Sneed to death. See § 13A-5-47.

The state's evidence tended to show the following: In the early morning hours of September 7, 1993, Clarence Nugene Terry, the clerk at Bud's Convenience Store, located in Decatur, was robbed and murdered. A surveillance camera recovered at the scene captured the robbery-murder on videotape. The videotape showed

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[1] The mitigating circumstance set out in § 13A-5-51(4) is as follows: "The defendant was an accomplice in the capital offense committed by another person and his participation in it was relatively minor." Although the trial court found that Sneed was not a minor participant in the offense, the court specifically found this circumstance to apply to Sneed, because he was not the gunman. The court further found that this circumstance was entitled to very little weight in determining the appropriate punishment.

Hardy and Sneed entering the store. Hardy was armed with a gun. Immediately upon entering the store, Hardy began firing at Terry. As Hardy fired the initial shot, Sneed walked past Hardy toward the cash registers. The first shot missed Terry, and he ran behind the counter. Sneed, by this time also behind the counter, tried to open the cash registers as Terry lay on the floor near his feet. As Sneed attempted to open the cash registers, Hardy leaned over the counter and shot Terry in the chest. Terry tried to protect and hide himself after he was shot in the chest. Hardy walked around the counter and fired five shots into Terry's face and head. Forensic evidence showed that Terry was still conscious when Hardy began shooting him in the head. Terry suffered gunshot wounds to the left cheek, left upper cheek, center of his forehead, left ear, left eye socket, right side of his chest, and the palm of his right hand. Any of the wounds to the head or the one to the chest would have proved fatal. As Terry lay dying on the floor, Sneed and Hardy continued attempted to open the cash registers. Sneed, at one point, kicked Terry's foot to move it out of his way. The attempts to open the cash registers were unsuccessful, so Hardy and Sneed unplugged one of the cash registers and took it with them when they ran out of the store.

The state's evidence further showed that on August 29, 1993, a few days before the robbery-murder, Sneed and Christopher Hines drove Hines's blue 1978 Ford automobile from Louisville, Kentucky, to Tanner, Alabama, to visit Hines's relatives. Sometime after arriving in Tanner, the two men met Hardy. On the evening of September 6, 1993 (the evening before the early-morning crime), Sneed, Hardy, and Hines rode in someone else's automobile to Tennessee to purchase fireworks and beer. They returned to Alabama, where they spent the remainder of the evening drinking. Around 10:30 p.m., Hines let Hardy borrow his

automobile; Sneed left with Hardy. Hines did not see either Sneed or Hardy until around 3:00 or 4:00 a.m. the next morning, when he accompanied them to a location near Hardy's father's house, where, using a sledgehammer, the three men attempted to get money out of a cash register. Subsequently, the cash register was recovered and Hines's fingerprint was later found on a piece of it.

The state's evidence also showed that police officers showed the surveillance videotape of the robbery-murder to several persons, including Hines, in an effort to identify the gunman and his accomplice. Hines and three others positively identified Hardy as the shooter. Hines and a law enforcement officer identified Sneed as the unarmed perpetrator in the videotape. On Wednesday, September 8, 1993, Sneed, Hardy, and Hines traveled to Louisville, Kentucky, and Sneed was arrested the same day. Sneed gave a statement to the Decatur police officers, in which he admitted participating in the robbery, but stated that he did not intend for anyone to get hurt. His defense at trial was that he participated in the robbery, but not the murder; that he was one of the people in the videotape, but not the gunman; and that he did not intend for anyone to be killed. He called no witnesses in his defense and did not testify himself. Rather, his defense was presented by his counsel through argument and cross-examination of the state's witnesses. He does not question the sufficiency of the state's evidence to support his conviction. Nevertheless, after reviewing the record, we conclude that there was sufficient evidence presented by the state from which the jury, by fair inference, could exclude every reasonable hypothesis except that of guilt and find him guilty beyond a reasonable doubt of the capital offense charged in the indictment, murder committed during the course of a

robbery in the first degree. In fact, the evidence of guilt of the capital offense was strong and convincing.

On appeal, Sneed raises 14 issues in his brief. Most of those issues are virtually identical to issues raised by Sneed's co-defendant, Hardy, in *Hardy v. State*. Where those issues are the same in all material respects, we will not address them further in this opinion. We adopt our holdings in *Hardy*, by reference, in regard to those issues.

I.

Sneed contends that the "joinder of [his] trial with Hardy's, over [his] objection, violated [his] federal and state constitutional rights." (Brief p. 6.) He argues that the trial court erroneously admitted into evidence a redacted version of his post-arrest inculpatory statement, which, he says, "distorted the facts of the case and enlarged [his] role in the offense." (Brief p. 6.) He further argues that the admission of the redacted statement "hampered his ability to put on his defense," "violated the rule of completeness," and "unlawfully limited [his] right to cross-examination." (Brief, pp. 7, 10, and 12.) He does not argue on appeal that being indicted jointly with Hardy was improper, but that the joinder became improper when the redacted statement was admitted into evidence. He contends that the trial court committed reversible error when it overruled his motions for a severance based on the prejudice caused by the alleged erroneous admission of the redacted statement. He did not file a pretrial motion for a severance, but moved unsuccessfully for a severance several times during his trial.

The joint indictment of Sneed and Hardy was proper because two or more defendants may be charged in the same indictment if they are alleged to have

participated in the same act or transaction. *Ala.R.Crim.P.* 13.3(b)(1). Here, Sneed and Hardy were charged with participating in the same act. Defendants joined in the same indictment shall be jointly tried unless severed as provided in Rule 13.4. If it appears that a defendant is prejudiced by such a joinder, the trial court may grant a severance or provide whatever other relief justice requires. Rule 13.4(a). The rule makes no distinction between capital and noncapital offenses. See *Rogers v. State*, 630 So.2d 78 (Ala.Crim.App.1991), *rev'd*, 630 So.2d 88 (Ala.1992), *aff'd. on remand sub nom. Musgrove v. State*, 638 So.2d 1347 (Ala.Crim.App.1992), *aff'd*, 638 So.2d 1360 (Ala.1993), *cert. denied*, 513 U.S. 845, 115 S.Ct. 136, 130 L.Ed.2d 78 (1994); *Hinton v. State*, 548 So.2d 547 (Ala.Crim.App.1988), *aff'd*, 548 So.2d 562 (Ala.), *cert. denied*, 493 U.S. 969, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989). The Alabama rule pertaining to joinder and severance is taken from the federal rule. Fed.R.Crim.P. 14. See also *Hinton v. State*, 548 So.2d at 555.

Weighing against severance is a preference for joint trials where joint crimes are involved. *Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). The United States Supreme Court stated the policy in *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), as follows:

> "It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of

> testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability--advantages which some-times operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." (Footnotes omitted.)

In *Hill v. State*, 481 So.2d 419, 424 (Ala.Crim.App.1985), we stated:

> "The decision whether to grant a severance, or order a joinder of defendants, lies within the broad discretion of the trial court. This Court will not overturn that decision absent an abuse of discretion. *United States v. Webster*, 734 F.2d 1048, 1052 (5th Cir.), *cert. denied sub nom., Hoskins v. United States*, 469 U.S. 1073, 105 S.Ct. 565, 83 L.Ed.2d 506 ... (1984). 'n order to establish an abuse of discretion, the defendant must show that he "received an unfair trial and suffered compelling prejudice against which the trial court was unable to afford protection." See *U.S. v. Berkowitz*, 662 F.2d [1127] at 1132 [(5th Cir.1981)].' [*United States v.] Webster*, 734 F.2d [1048] at 1052 [(5th

Cir.), *cert. denied*, 469 U.S. 1073, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984)].

A defendant seeking to overturn the denial of a motion for severance has the burden of demonstrating specific and compelling prejudice that the trial court cannot protect against and that causes his trial to be unfair. It must be demonstrated that the prejudice is specific and that it resulted from the denial. A demonstration of some prejudice is insufficient. *Minnis v. State*, 690 So.2d 521 (Ala.Crim.App.1996). In order to justify a severance, a defendant must show before or during the trial that there was a serious risk that his rights would be compromised, or that severance was necessary for the jury to make a reliable judgment. *Zafiro v. United States.*

In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the United States Supreme Court held that admission of the confession of a nontestifying defendant, implicating his codefendant in the crime, violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment, notwithstanding any cautionary instructions to the jury. *Id.* at 136, 88 S.Ct. 1620. In *Richardson v. Marsh*, however, the Supreme Court held that the admission of a nontestifying defendant's confession does not violate the Confrontation Clause where the confession is redacted to eliminate the codefendant's name and any reference to him and the court gives the jury a proper limiting instruction.

In the instant case, the state offered into evidence a redacted version of Sneed's statement in order to avoid violating Hardy's Sixth Amendment confrontation rights. The redacted statement was admitted into evidence over Sneed's objection. Sneed argues that by eliminating all references to Hardy in the statement and by substituting

the pronoun "I" for "we" or "he" whenever they appeared in the statement the redacted statement distorted the meaning of his statement, distorted the facts of the case, enlarged his role in the crime, made it appear that he was primarily responsible for planning and executing the crime, and effectively nullified his defense that he lacked the specific intent to commit murder. He argues that this redaction erroneously made him appear to be the primary actor in the commission of the offense. Sneed did not testify at his trial or call any witnesses in his behalf at the guilt phase of his trial. He relied on the cross-examination of the state's witnesses and arguments of his counsel to present his defense. His defense against the capital charge consisted of a denial that he had committed intentional murder, while admitting his guilt to robbery in the first degree and to felony murder. He argued that even though he willingly participated in the robbery, he did not shoot the victim and he did not intend that anyone be shot or killed in carrying out the robbery. He states in his brief, "Mr. Sneed thought Mr. Hardy meant that they would strongarm a convenience store, or in other words, demand money without deadly force." (Brief, p. 2.) He argues on appeal that the language redacted from the statement eliminating all references to Hardy and to Hardy's actions in conceiving, planing, and carrying out the robbery, including the shooting of the victim, denied him a fair trial, in that it hampered his ability to present his defense, violated the rule of completeness, and unlawfully limited his right of cross-examination of the state's witnesses.

Clearly, Sneed's original statement was changed considerably by the redaction. While Sneed had an interest in having his complete original statement presented to the jury, the trial court had concurrent obligations both to protect the interests of the codefendant, Hardy, who would have been implicated by

the admission into evidence of Sneed's complete statement, and to consider the interests of judicial economy that are advanced by joint trials. In deciding whether to redact portions of a defendant's statement, a trial court balances the interest in protecting a codefendant's confrontation right against the judicial economy achieved by a joint trial. See *United States v. Castro*, 813 F.2d 571 (2d Cir.), *cert. denied*, 484 U.S. 844, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987); *United States v. Mussaleen*, 35 F.3d 692 (1994). We review the trial court's balancing of these competing interests under an abuse-of-discretion standard. *United States v. Mussaleen*; *United States v. Castro*; *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980). In a case similar to this case, *United States v. Castro*, the court upheld a conviction despite the defendant's claims that he was prejudiced by the admission of testimony in the form of his statements with his codefendant's name redacted. The defendant had shown federal agents the location of cocaine in a black plastic bag, adding that the bag belonged to his codefendant, who had put it there. The testimony at trial described those statements without any mention of the codefendant, but noting that the defendant had in substance denied ownership of the bag and its contents. The court held:

> "While Castro had an interest in having his statement presented in context, the court had concurrent obligations both to protect the interest of the co-defendant Pozo (Acosta), who could have been implicated by Castro's full statement, and to consider the interests of judicial economy, which are advanced by a joint trial. By suggesting that the government on direct, and Castro on

cross-examination, elicit from Officer Figueroa the essential point Castro wanted to present to the jury, i.e., that Castro 'in substance' denied ownership of the cocaine, the court reasonably accommodated these competing interests. The gist of Castro's statement was presented without unduly prejudicing either the right of Pozo to avoid being implicated by a co- defendant's out-of-court statement, or the right of Castro to have his conduct and statement presented in context. We cannot conclude that this approach was an abuse of discretion. In any event, any error was harmless.

"As a general proposition, an error with respect to admission of evidence will result in reversal of a conviction if it had 'substantial and injurious effect or influence in determining the jury's verdict.' *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); see *United States v. Teitler*, 802 F.2d 606, 616 (2nd Cir.1977[1986]). However, if the evidence against the defendant is overwhelming, and the prejudice resulting from the error is relatively insignificant, the error is likely to have been harmless. See *Teitler*, 802 F.2d at 616-17."

813 F.2d at 576-77. See also *United States v. Mussaleen*, 35 F.3d at 696-97 (holding no error where contested portion of redacted statement reached the jury through the testimony of witnesses); *United States v. Lopez*, 898 F.2d 1505, 1510 n. 10 (11th Cir.1990).

In the instant case, the gist of what Sneed claims was improperly redacted from his statement was presented to the jury through testimony of other witnesses, through demonstrative evidence, and through facts elicited on cross- examination. The trial court was very lenient in permitting Sneed to cross-examine the state's witnesses, obviously to allow him to present his defense to the jury. His defense--that he did not act alone, did not acquire or carry the weapon, did not intend for anyone to get hurt, did not shoot the victim, and did not possess the requisite intent to be found guilty of murder--was clearly before the jury. The substance of Sneed's statement was presented without unduly prejudicing either Hardy's right to avoid being implicated by Sneed's out-of-court statement or Sneed's right to have his conduct and statement presented in context.

The videotape from the surveillance camera shows that two men were involved in the commission of the crime and that Sneed was not the triggerman. Sneed in cross-examination of Officer Boyd and Officer Hale brought out that the redacted statement admitted in evidence was not Sneed's entire statement and that the original statement contained more details; that Sneed stated in giving his statement when questioned that he never intended for anyone to get hurt and had no part in the killing; that he stated that he was unarmed and never fired a weapon; and that the officers had no evidence that he ever fired a weapon; that he did not acquire the weapon; that it was not his idea to burn the clothes; and he stated that the sleeve he used for a mask was given to him.

Hale testified that Hardy borrowed the automobile from Hines; that Hardy admitted borrowing the automobile, hiding the weapon, and burning the clothes; and he identified the shooter in the videotape as Hardy.

Hines testified that Hardy had borrowed his automobile; that Hardy and his father got in an argument about a missing gun; and he identified Hardy and Sneed as the two men depicted in the videotape, and he identified Hardy as the triggerman. In addition, Sneed's counsel presented his defense clearly and forcefully in his summation to the jury in the guilt-phase of the trial. He stated:

> "But sometimes things happen and it makes it even more important and appropriate for you people to make the right decision in this case as to the culpability of either of these defendants, because there's a significant difference in the culpability of these people.
>
> "State's Exhibit 69 [the redacted statement], and what I want you to do--you'll have this available to you to examine. What I want you to do is I want you to read this statement. Will each of you promise you will at least read the statement? Will you do that for me?
>
> "Now, when you read the statement, don't just read it for its contents, juxtapose the statement against the video that you've all seen. I suggest to you and I'm sure Judge Brown will tell you, that if you want to see the video again you're going to be allowed to do that. When you think about the video and you think about what's said in here, I want each of you, every one of you, to ask yourselves this question: 'What is not said in this statement?' Because everything in this

statement is the truth except with regards to whoever else is in that video.

"I'm not going to get into the rules of procedure and the rules of evidence that require it to be done this way, but obviously the Court endorsed this statement. What I want you to do is think about the video and read this statement and ask yourselves questions like this. 'I forgot to say that after I drove by the first time I stopped and took the sleeves off a shirt.' Not my shirt. Off a shirt.

"Well, whose shirt was it? Was there only one person in this video? No. Did y'all see more than one person come into the store on the video? You did, didn't you? They can argue all they want to [that] it wasn't their client, but you did see another person come in there. When he's being interviewed, he's trying to be truthful. He says, 'By the way, I forgot to say that after I drove by the first time, I stopped to take the sleeves off a shirt.'

"Well, it wasn't his shirt and we all know that. You all know that. 'When I went by the store the second time, I stopped and I got out and I walked to the front door.' If you will remember that video, there wasn't just an 'I' walking to the front door. There was a 'we' walking to the front door. There were two people walking to the front door. Somebody is insulting your intelligence by saying that there's just one person walking to the

door. You all saw two people walking to the door.

"You also saw that when my client walked in, the other person in the video, the first thing he does is he raises that .22 rifle and points it at the clerk. It's obvious Mr. Terry is defenseless. He's unarmed. He doesn't even have a place to run. After the first shot, he goes and he falls down behind the counter and begs for his life and you know that my client didn't do anything to cause that."

"....

"... They all told you that wasn't all of his statement [redacted statement], that he said a lot of other things in his statement.

"I expect the Judge is going to charge you when she charges you, that you can give as much weight to the things that I elicited on cross-examination about his statement in Kentucky, as you do the one read to you by the police department. There's a reason why people object to things and why parts come in here and parts come in there. It doesn't mean that one part of it is more--what they put in is any more important than what I have to say.

"There's a statement. You know there's another statement. You know there's a statement that's more detailed than the one you heard from the State of Alabama, and it may not be his fault It's

not his fault it didn't all come in. But you know that there's one more detailed than that.

"And you know in that statement he didn't tell anybody it was his rifle. Are we to conclude that it was somebody else's rifle? Obviously. And he didn't tell them that he acquired that rifle so he could go rob somebody. Are we to conclude that somebody else did that? I had to ask him questions and it's difficult for me when the wind started blowing again, and I had to ask questions like, 'Well, did my client tell you that he got that shirt sleeve or it was given to him?' It's hard for me to ask those questions but I think we got the gist of what was said, that somebody else obtained the shirt sleeve and used it for masks and gave it to my client.

"I think it's obvious from those questions that I asked, that what Lieutenant Boyd said when he was in Kentucky, who took the gun when they left there, who did it, who disposed of it. It's pretty obvious to me that Charles Sneed--I call him Charles. Charles Sneed was not the one who masterminded this robbery or the murder of it."

And the trial court, obviously endeavoring to balance the rights of the defendants and ensure that Sneed's defense was presented to the jury, emphasized in its oral charge to the jury that the redacted statement admitted into evidence was not Sneed's entire statement, and that the jury should consider and could give as much weight to the statements attributed to Sneed that were

brought out on cross-examination as it could give the redacted statement. The trial court, charged the jury, as follows:

> "I charge you, members of the jury, that State's Exhibit 69 [the redacted statement] as read to you is not the entire statement of Defendant Sneed, and that you can give as much weight to the statements of Defendant Sneed as elicited on cross-examination as [you] do to those in State's Exhibit 69."

Sneed also contends that the admission into evidence of the redacted statement denied him a fair trial because, he says, its admission violated the rule of completeness. In Alabama, the general rule of completeness is stated, as follows:

> " 'If a part of a conversation is adduced in evidence by the state as proving the defendant's declarations or confessions of guilt, the defendant has the right to call for the whole of what was said in that conversation relative to the subject matter of the issue. *Chamber[Chambers] v. State*, 26 Ala. 59 (1855); *William v. State*, 39 Ala. 532 (1865); *Mullis v. State*, 258 Ala. 309, 62 So.2d 451 (1953). The accused is entitled, on cross-examination, to bring out all that he said, at the same time and on the same subject. *Parke v. State*, 48 Ala. 266 (1872).
>
> " 'However, the rule which frowns upon incomplete confessions is designed to cover cases where an accused, after admitting commission of the criminal act,

> is prevented from going further and saying anything which might explain or justify his act. *William, supra*; *United States v. Wenzel*, 311 F.2d 164 (2d[4th] Cir.1962); see generally 29 Am.Jur.2d 586, Evidence, S 535.'
>
> "*King v. State*, 355 So.2d 1148, 1151 (Ala.Cr.App.1978)....
>
> "....
>
> " 'A confession should be considered in its entirety. If the state introduced into evidence only a portion of an alleged confession, a defendant is entitled to introduce the remainder of what was said to and by him, including any exculpatory statements which would bear upon the matter in controversy.'
>
> "*King v. State*, *supra*, at 1151."

Bridges v. State, 516 So.2d 895, 898-99 (Ala.Crim.App.1987).

When part of a defendant's post-arrest statement is introduced, the defendant generally has the right to have the entire statement introduced. Courts have recognized, however, that in cases where a redacted version of a statement is necessary to protect the rights of a codefendant, the rule of completeness will be violated only when the statement in its edited form effectively distorts the meaning of the statement or excludes information exculpatory of the declarant. *United States v. Smith*, 794 F.2d 1333, 1335 (8th Cir.1986); *United States v. Alvarado*, 882 F.2d 645 (2d Cir.1989); *United States v. Lopez*, 898 F.2d 1505, 1510 n. 11 (11th Cir.1990).

While the admission of the redacted statement may have hindered to some extent Sneed's ability to present his defense, the hindrance was inconsequential because he was ultimately able to fully present those facts he deemed important in his defense. Initially the redacted statement appeared to violate the rule of completeness by distorting the statement and excluding exculpatory information. However, as the trial progressed, it became clear that no violation occurred because the jury had before it all the evidence supporting his defense, even though some of the information had not been included in the edited statement. Subsequent testimony cleared any distortion and supplied the exculpatory evidence. "The rule of completeness is not violated when the meaning of the redacted statement becomes clear despite the redaction." *United States v. Long*, 900 F.2d 1270, 1279 (8th Cir.1990).

We do not agree with Sneed's assertion that he was unlawfully limited in his right of cross-examination.

Moreover, in this case, even if the admission of Sneed's redacted statement was erroneous, it would not mandate reversal; the evidence of guilt of the capital crime charged was so overwhelming that any error in this regard would have been harmless.[2] If error occurred, it

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[2] This court has written: "After finding error, an appellate court may still affirm a conviction on the ground that the error was harmless, if indeed it was. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 ... (1967); *Sattari v. State*, 577 So.2d 535 (Ala.Cr.App.1990), *cert. denied*, 577 So.2d 540 (Ala.1991); *A.R.App.P.* 45. The harmless error rule applies in capital cases. *Ex parte Whisenhant*, 482 So.2d 1241 (Ala.1983); *Henderson v. State*, 583 So.2d 276 (Ala.Cr.App.1990), *aff'd*, 583 So.2d 305 (Ala.1991), *cert. denied*, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 ... (1992); *Musgrove v. State*, 519 So.2d 565

could not have had an injurious effect or influence on the jury's verdict nor could it have injuriously affected Sneed's substantial rights.

We conclude that the trial court did not abuse its discretion in denying Sneed's motions to sever. He did not meet his burden by showing specific and compelling prejudice, against which the trial court was unable to afford protection, that would warrant a severance under the facts of this case. The trial court was well within its discretion in admitting Sneed's statement in redacted form. The ruling protected Hardy's right to confrontation of the witnesses against him and served the intent of judicial economy by allowing for a joint trial of two defendants whose alleged criminal conduct arose from the same set of facts. We cannot conclude that the manner in which the trial court balanced the rights of the defendants and accomodated their competing interests was an abuse of discretion in this case. In any event, if error occurred, it was harmless.

(Ala.Cr.App.), *aff'd*, 519 So.2d 586 (Ala.1986), *cert. denied*, 486 U.S. 1036, 108 S.Ct. 2024, 100 L.Ed.2d 611 ... (1988).... In order for a constitutional error to be deemed harmless under *Chapman*, the state must prove beyond a reasonable doubt that the error did not contribute to the verdict. In order for the error to be deemed harmless under Rule 45, the state must establish that the error did not or probably did not injuriously affect the appellant's substantial rights." *Guthrie v. State*, 616 So.2d 914, 931 (Ala.Cr.App.1993), *aff'd*, 689 So.2d 951 (Ala.), *cert. denied*, 522 U.S. 848, 118 S.Ct. 135, 139 L.Ed.2d 84 (1997). See also *Greathouse v. State*, 624 So.2d 202 (Ala.Crim.App.1992), *aff'd*, 624 So.2d 208 (Ala.1993).

II.

Sneed contends that the trial court denied his constitutional right to an individualized sentencing by refusing to sever his penalty-phase hearing from that of Hardy. The basis of this contention is essentially that, under the circumstances here, the jury would be unable to give separate, personal consideration to the sentence of each individual defendant and to base each defendant's sentence on that defendant's own acts and statements, and the evidence applicable to him. He argues that the risk of prejudice by this joinder was too great to alleviate by jury instructions.

Section 13A-5-46(b) provides that the sentencing hearing in a death penalty case shall be conducted before the same jury that convicted the defendant, except in certain situations not present in this case. The same policy considerations that favor joint trials in the guilt phase also apply in the sentencing phase. See *United States v. Tipton*, 90 F.3d 861 (4th Cir.1996). See also *Richardson v. Marsh*; *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

The Eighth Amendment requires an individualized sentencing determination in a death penalty case. *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The record does not support Sneed's claim that a joint sentencing hearing made it impossible for the jury in this instance to render an individualized sentencing decision as to each defendant. This was not a case in which there was considerably more aggravating evidence against one defendant than against the other. Both defendants had been indicted and convicted of the same murder-robbery. The evidence of aggravating circumstances that the state presented at the sentencing hearing was identical as to each defendant. In

addition, each defendant was given the opportunity to present, and presented, mitigating evidence relevant to his character and record.

Lee Brewer, a minister, testified at the sentencing hearing before the jury that he had counseled Sneed on a regular basis since Sneed had been in jail awaiting trial in this case; that Sneed was a good, an active, and an interested Bible student; that Sneed had accepted Christ as his savior and had been baptized in jail; that he believed that Sneed was sincere; and that, if given the opportunity, Sneed could make a difference in helping others with their lives in prison. Antoine Aycock, a minister, testified also. He testified that he had worked with Sneed and Brewer in jail, and that he believed that Sneed was sincere, and could do good and make a worthwhile contribution to the lives of others if given a chance. Brewer was recalled as a witness for Sneed at the sentencing hearing before the trial court. He further testified that he had continued to counsel Sneed since the trial; that Sneed had continued his Bible studies and had counseled other inmates; and that he believed that Sneed could make a positive impact on others if he were allowed to live. Also, a letter from an inmate in the jail was introduced into evidence, confirming and supporting Brewer's testimony.

Before, during, and after closing arguments, the trial court specifically instructed the jury to give separate consideration to each defendant. The jury was informed on each of those occasions that each defendant was entitled to have his sentence decided based on the evidence and applicable law and that any evidence that was limited to only one defendant should not be considered as to the other defendant. In addition, counsel for the defendants, as well as the prosecutor, in their closing arguments, reiterated and emphasized the trial

court's instructions in this regard. After closing arguments in the sentencing phase, the trial court instructed the jury as follows:

> "You have heard two separate sentencing hearings that were presented at the same time. As you listen to these instructions and as you deliberate, it is your duty to give separate personal consideration to the sentence of each individual defendant.
>
> "When you do so, you must analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against the other defendant.
>
> "Each defendant is entitled to have his sentence determined from his own acts, statements and other evidence in the case, which may be applicable to him."

(R. 3887-88.) Because there is nothing in the record to indicate the contrary, we presume that the jury understood and followed these instructions. See *Richardson v. Marsh*; *United States v. Tipton*. We find nothing in the record to suggest that the jury was unable to weigh the evidence separately, to separate the aggravating and mitigating factors applicable to each defendant, to consider and weigh them, and to render the individualized decision required. The evidence as to each defendant and the issues in the case were not complicated.

Thus, we find no abuse of discretion by the trial court in denying the motions for severance in the penalty phase and in conducting a joint penalty-phase trial in this case.

III.

Sneed claims that the charging indictment is due to be dismissed and his conviction reversed because, he says, the method of selecting grand jury forepersons in Morgan County is racially discriminatory. Sneed's codefendant Hardy filed a pretrial motion seeking to dismiss the indictment, based in part upon this allegation. Sneed, however, raises this issue for the first time on appeal. Therefore, we review this contention pursuant to the plain error rule.

> "In considering what constitutes plain error in a capital case, we have adhered to the interpretation of the term 'plain error' adopted by the Alabama Supreme Court, which follows the interpretation given that term by the federal courts. See *Ex parte Harrell*, 470 So.2d 1309 (Ala.), *cert. denied*, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 ... (1985); *Ex parte Womack*, 435 So.2d 766 (Ala.), *cert. denied*, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 ... (1983). See also *Hooks v. State*, 534 So.2d 329 (Ala.Cr.App.1987), *aff'd*, 534 So.2d 371 (Ala.1988), *cert. denied*, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 ... (1989). Plain error is error that has or probably has adversely affected a substantial right of the appellant, *Ala.R.App.P.* 45A, or is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings. *Ex parte Womack*."

Bush v. State, 695 So.2d 70, 87

(Ala.Crim.App.1995), *aff'd*, 695 So.2d 138 (Ala.), *cert. denied*, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997). " '[T]he plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." ' *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 ... (1985), quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 ... (1982)." *Burton v. State*, 651 So.2d 641, 645 (Ala.Crim.App.1993), *aff'd*, 651 So.2d 659 (Ala.1994), *cert. denied*, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995).

The trial court held a hearing on Hardy's motion to dismiss the indictment and found that no prima facie case of discrimination had been established. We affirmed the trial court's ruling in this regard in Part III of our opinion in *Hardy*, ___ So.2d at ___. Certainly, on this basis, we find no plain error in regard to Sneed.

IV.

Sneed contends that the trial court erred in allowing Sergeants Boyd and Hale to identify Sneed as the unarmed perpetrator depicted in the store's surveillance videotape. Boyd did not identify, before the jury, any participant depicted in the videotape. Thus, we address the admission of only Hale's identification.

In concluding that Sneed was the unarmed person depicted in the videotape, Hale testified that Sneed gave information at booking that he was 6 feet, 1 inch in height and that he weighed 275 pounds; that Sneed appeared to actually be a little heavier than that; that he spent 3 or more hours with Sneed when he interviewed him in Kentucky within a week of the crime; that he spent additional time with Sneed after Sneed was returned to Alabama; and that after viewing the videotape during the

interview in Kentucky, Sneed admitted that he was the participant depicted in the videotape carrying the cash register. We further note that Sergeant Stine, an employee with the Jefferson County, Kentucky, police department, testified that Sneed had lost "a considerable amount of weight" between his arrest and his trial. (R. 2598.) In addition, Boyd testified that Sneed appeared substantially different at trial than he did when arrested; that, in his estimation, at arrest Sneed weighed close to 300 pounds; and that, at trial, Sneed had had "a substantial weight reduction." (R. 2878.)

We find, based on the principles and factors discussed in Part V in our opinion in *Hardy*, ___ So.2d at ___, that Hale's identification of Sneed was properly admitted: Hale testified to facts that were within his personal knowledge, and he was in a better position than the jury to draw the inference of identity from the facts. See *Ex parte Rieber*, 663 So.2d 999 (Ala.), *cert. denied*, 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995). Unlike the jury, Hale was familiar with Sneed's appearance shortly after the robbery-murder; Sneed had disguised his appearance at the time of the offense; and his appearance was significantly altered prior to trial. (We note that this latter factor was not present in regard to the identification of Hardy.) See *United States v. Pierce*, 136 F.3d 770 (11th Cir.), *cert. denied*, 525 U.S. 974, 119 S.Ct. 430, 142 L.Ed.2d 350 (1998).

Furthermore, we note that Hale's identification was cumulative of Hines's identification of Sneed as the unarmed person in the videotape. Hines testified that he and Sneed were "best friends"; that he had known him seven or eight years; that when they arrived in Alabama, they went places with Hardy; that he saw Sneed several hours before the crime and again several hours after the crime; and that he recognized Sneed in the videotape

when he viewed it several days after the crime. Hines's familiarity was derived from a close relationship and substantial, sustained contact with Sneed; and he was most familiar with Sneed's appearance at the time the videotape was made because he saw Sneed within several hours before and after the offense was committed.

Finally, and perhaps most significantly, the issue whether Sneed was the unarmed person depicted in the videotape was not seriously contested. Sneed's defense was that, although he robbed the victim, he had no intention of killing the victim or prior knowledge that the victim would be killed; in essence, he admitted his presence as the unarmed perpetrator.

V.

Sneed contends that the prosecutor engaged in misconduct that deprived him of a fundamentally fair trial, due process, and a reliable sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, his rights under the Alabama Constitution, and his rights under state law. We have reviewed the following specific allegations and reject them for the same reasons we rejected these contentions in regard to Sneed's codefendant Hardy, in Part VII of our opinion in *Hardy*, ___ So.2d at ____.

Sneed contends that the trial court erred in denying his motion for a severance made during the prosecutor's closing argument in the sentencing phase of the trial before the jury. He argues that the prosecutor improperly urged the jury to sentence him to death based on comments of Hardy's counsel made during the trial. The record shows that the prosecutor stated as follows:

> "I made some notes during the course of this trial about this case. These are quotes. 'Shot in cold blood. A horrible

> crime was committed against an innocent victim. Terry dies a horrible unpleasant death. It was a terrible awful thing.' My words? No. Those are Mr. Cauthen's [counsel for Hardy]."

(R. 3879-80.)

Sneed's trial counsel objected to the comments, and moved for a severance of the sentencing phase of the trial or in the alternative for instructions to the effect that the comments of Hardy's counsel in no way reflected how Sneed's counsel felt about the case. The record shows the following:

> "[I]n light of the fact that the District Attorney's last argument about comments made by defense counsel, particularly I think he referred to Mr. Cauthen and Mr. Madison and somebody begging for their life, worse crime, you heard what he said, we would request that our case be severed at this time for purposes of sentencing."

(R. 3881.)

The trial court ruled as follows:

> "I'll deny the severance, but I'll remind and instruct the jury that any statements made by counsel are not evidence and not to be considered--any statement or remarks of counsel on behalf of the state on their notes is not evidence and they should not reflect on the defendants in any manner."

(R. 3883.)

Shortly thereafter, the trial court gave the following instruction:

> "Ladies and gentlemen, before I begin my instructions, let me remind you of the instructions that I gave you earlier in the week.
>
> "Any comments or remarks or statements made by counsel are not evidence and cannot be used as evidence in this case. Likewise, any remarks that one attorney has used concerning the comments or remarks of another attorney, that is not evidence, nor can those remarks be taken or used or looked at against any of the other defendants, either of the defendants.
>
> "You have heard two separate sentencing hearings that were presented at the same time. As you listen to these instructions and as you deliberate, it is your duty to give separate personal consideration to the sentence of each individual defendant."

(R. 3886-87.)

We agree with the state, that the comments complained of, regardless of their origin, were accurate descriptions of the crime, and supported by facts in the record. We do not find the comments improper under the circumstances here; however, assuming for the sake of argument that they were improper, there still is no error, because the trial court was well within its discretion in denying the motion for a severance. This is especially so in view of the curative instructions specifically requested by Sneed as an alternative. We think the curative

instructions cured any possible harm which may have been done by the comments. Jurors are presumed to follow their instructions, and in the absence of some evidence to the contrary, and we find none, we must presume that the jurors did so in this case. See *Taylor v. State*, 666 So.2d 36 (Ala.Crim.App.1994), *aff'd*, 666 So.2d 73 (Ala.1995), cert. *denied*, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996).

F.

Sneed contends that the prosecutor's allegedly improper comments specified above, when looked at collectively, rendered his trial and sentencing unreliable and violated his rights to due process, a fair trial, and an impartial jury. We have reviewed each allegedly improper comment individually and have found no error warranting reversal. We have also reviewed the cumulative impact of the allegedly improper comments and still find no reversible error.

VI.

Sneed claims that reversible error occurred because he was not present during part of an in camera hearing on the redaction of his statement and during the in camera questioning of a juror regarding that juror's request for two videotape recorders during deliberations. He contends that these absences violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution; Article 1, § 6, *Alabama Constitution of 1901*; Rule 9.1, *Ala.R.Crim.P.*; and Alabama caselaw.

We have reviewed the portions of the record relating to these two in-chambers hearings pursuant to the plain error rule because this issue is raised for the first time on appeal. In both instances, Sneed specifically waived his presence during these portions of the proceedings. In the first instance, the following occurred

in regard to the discussion concerning his redacted statement:

> "[SNEED'S COUNSEL]: ... Basically the same arguments were made before the chambers and after and we've adopted all of those arguments back and forth, but neither one of the defendants was present in your chambers. Certainly, Mr. Sneed wasn't. I don't intend to state for Mr. Hardy.
>
> "....
>
> "We've talked to our client. He's aware of that. He waives his presence for that one brief hearing. I know it didn't take long. Basically, for the record, it was just a continuation of the arguments we made before. They were strictly legal arguments and his presence wouldn't have added to that hearing."

(R. 2733-35.) In the second instance, immediately before the in-chambers questioning of a juror, the following occurred:

> "[HARDY'S COUNSEL]: Defendant Hardy waives his right to be present during the questioning of juror [D.M.].
>
> "....
>
> "[SNEED'S COUNSEL]: Charles, did you hear what [counsel] said?
>
> "[SNEED]: Yes.
>
> "[SNEED'S COUNSEL]: You and I just spoke about that?

"[SNEED]: Yes.

"[SNEED'S COUNSEL]: And you agree to waive your presence for that hearing?

"[SNEED]: Yes."

(R. 3660-61.) The two hearings were related to legal matters and were not related to Hardy's guilt or innocence, and his presence would not have benefited his defense. *Burgess v. State*, 723 So.2d 742 (Ala.Crim.App.1997) (no error occurs by capital defendant's absence from non-critical stages of trial if his presence would not have benefited his defense). See also *Harris v. State*, 632 So.2d 503 (Ala.Crim.App.1992). Sneed has not demonstrated that he suffered any prejudice as a result of his absence. We have reviewed and rejected this same contention in Part VIII of our opinion in *Hardy*, ___ So.2d at ___.

VII.

Sneed contends that his statutory and constitutional rights and Alabama law were violated by the state's failure to comply with the discovery order of the trial court. He argues that the discovery violation adversely affected his ability to prepare his defense to such an extent that he is entitled to a reversal of his conviction. He relies on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Ex parte Monk*, 557 So.2d 832 (Ala.1989); and *Padgett v. State*, 668 So.2d 78 (Ala.Crim.App.), *cert. denied*, 668 So.2d 88 (Ala.1995), to support his contention. Like codefendant Hardy, Sneed filed numerous pretrial motions seeking the production of certain items and information from the state. The trial court granted broad and extensive discovery, beyond that required by *Ala.R.Crim.P.* 16.2, and in keeping with the open-file policy contemplated in *Ex parte Monk*. In fact, Sneed was granted and received practically everything he

asked for except matters in the file that were the prosecutor's work product. Sneed specifically claims that the state violated the discovery order by failing to timely disclose its intent to call Steve Bernard and Tom Edwards as witnesses for the state, and by failing to produce the records they kept. He also claims that the trial court erred in denying his pretrial motion seeking the production of the criminal records, if any, of the law enforcement witnesses the prosecutor intended to call. He further claims that his conviction should be reversed because the grand jury that indicted him did not record the testimony of witnesses appearing before it. These identical issues were raised by codefendant Hardy on appeal. We addressed them at length in Part II of our opinion in that case, concluding that they were without merit. *Hardy*, ___ So.2d at ___. We find no discovery violation in this case, and we adopt our holding and reasoning on this issue in *Hardy*. *Id.*

VIII.

Sneed asserts that the trial court's finding that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, § 13A-5-49(8), was erroneous. He raises the same arguments that we rejected in Part X of our opinion in *Hardy*, ___ So.2d at ___. The trial court's findings in support of this aggravating circumstance, which follow, are supported by the evidence and are sufficient to support its finding of the aggravating circumstance. We concur in these findings.

> "The Court finds the State has proven beyond a reasonable doubt the offense was especially heinous, atrocious and cruel. This crime is set apart from other capital cases in that the crime was a conscienceless and pitiless crime and was

unnecessarily torturous to the victim. Defendant Hardy shot and killed Clarence Nugene Terry while Defendant Sneed worked on trying to get the cash registers open. When the first shot was fired, the victim ran behind the counter and attempted to hide, rolling himself into a ball; however, defendant Hardy leaned over the counter and shot the victim in the chest. Mr. Terry lay on the floor immediately to the left of Sneed's feet. All the while Hardy was shooting, Sneed kept right on working to try and get the cash registers open as though nothing else was happening around him. After Hardy came around the counter and stood over the victim and shot at least five more times while the victim lay unarmed and helpless on the floor, defendant Sneed never stopped trying to get the cash registers open. Further, Mr. Terry did not die immediately after the first shot to his chest but lived for at least fifteen (15) seconds while Hardy continued to fire shots into his head. After Hardy finished shooting Mr. Terry, Defendant Sneed kicked the victim's foot out of the way in order to gain easier access to the second cash register.

"In addition, the jury concluded that Defendant Sneed had the specific, particularized intent that Clarence Nugene Terry be killed during the course of the robbery thereby making Sneed legally accountable for the murder under accomplice liability even though Sneed

> did not personally commit the act of murder. Therefore, the aggravating circumstance in Section 13A-5-49(8), *Code of Alabama*, does exist and is considered by the court in determining the appropriate sentence to impose in this case."

(CR.151-52.)

In Issue VIII of his brief to this court, Sneed also contends--without any supporting argument--that the trial court erred in finding the existence of the aggravating circumstance that the capital offense was committed while Sneed and his accomplice were engaged in the commission of a robbery, § 13A-5-49(4). As the trial court noted in its sentencing order, not only did the jury's verdicts of guilty and the evidence establish this circumstance, but "[b]oth defendants, through counsel, admitted that murder during the course of a robbery is a statutory aggravating circumstance." (CR.144-45.) See also § 13A-5-45(e) ("any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing").

IX.

Sneed contends that the trial court erred in failing to conduct individually sequestered voir dire of the jury venire to determine whether any veniremember's impartiality had been affected by pretrial publicity. We have reviewed and rejected this same contention in Part XI of our opinion in *Hardy*, ___ So.2d at ___.

X.

In a one-page argument addressing Issue X in his brief to this Court, Sneed contends that the trial court erroneously denied his motion for a change of venue. He argues the same points asserted by Hardy, but adds that "[t]he victim's relatives or friends apparently made comments to the media about the defendants. CR. 62." (Brief, p. 46.) He rests this unsubstantiated assertion on his unsworn pretrial motion seeking a "gag" order filed, wherein he generally asserted that following his arraignment, the victim's relatives and friends made comments to the newspaper media.

The trial court conditionally denied Sneed's motion for a change of venue, with leave to renew it "based upon voir dire." (C.R.108.) (As was Hardy's motion, Sneed's motion was not made on oath, as required by Rule 10.1(c).) Sneed renewed his motion after the parties exercised their peremptory strikes, basing it on "all of the evidence that came forth in the voir dire examination" (R.2076-77), and the trial court denied the motion.

We find, under the principles iterated in Part XII of our opinion in *Hardy*, ___ So.2d at ___, that Sneed's unsworn motion is procedurally defective; that Sneed did not introduce any evidence of any pretrial media coverage, much less substantial prejudicial publicity; that, therefore, he has not shown that the media coverage saturated the community with prejudicial publicity; that a review of the cited pages from the record does not support Sneed's assertion that he was actually prejudiced by the pretrial publicity; and finally that the trial court did not abuse its discretion in denying Sneed's motion for a change of venue. (In so holding, we have rejected Sneed's argument that he met his burden of proof with "evidence" that "the victim's relatives and friends

apparently made comments to the media about the defendants.)

XI.

Sneed next contends that the qualified venire from which his jury was drawn was impermissibly small. This argument is based on his asserted premise that *Ala.R.Crim.P.* 18.4, which sets out the procedure for selecting a jury, is silent on the number of veniremembers to be added to the venire for each additional defendant tried in a joint capital trial. We have reviewed and rejected this same contention in Part XIII of our opinion in *Hardy*, ___ So.2d at ___.

XII.

Sneed claims that, during the sentencing phase of his trial, his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by the prosecution's reliance upon the robbery as an element of capital murder and as an aggravating circumstance. He argues that as a result of thid "double counting" of robbery, he was subjected to two punishments. This practice of double counting has been upheld. See Part XIV of our opinion in *Hardy*, ___ So.2d at ___.

XIII.

Sneed contends Alabama's manner of execution--electrocution--constitutes cruel and unusual punishment in violation of the Eighth Amendment. We reviewed and rejected this contention on many occasions. See our discussion in Part XV of our opinion in *Hardy*, ___ So.2d at ___.

XIV.

Sneed contends that the cumulative effect of the alleged errors enumerated in his brief to this court was to

violate his rights to due process and to a fair trial under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, and that he is therefore entitled to a new trial. We do not agree. We have reviewed each and every allegation of error and have found no error. We have also reviewed all of his alleged errors collectively, and still find no error or violation of Sneed's rights.

XVII.

In accordance with *Ala.R.App.P.* 45A, we have examined the record in this case for any plain error, whether or not brought to our attention or to the attention of the trial court. We have found no plain error or defect in the proceedings, either in the guilt phase or in the sentencing phases of the trial.

We have also reviewed Sneed's sentence pursuant to § 13A-5-53, which requires that, in addition to reviewing the proceedings for any error involving the conviction, we shall also review the propriety of the death sentence. This review shall include a determination of the following: (1) whether any error adversely affecting Sneed's rights was made in the sentence proceedings; (2) whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence; and (3) whether death is the appropriate sentence in this case. Section 13A-5-53(b) requires that, in determining whether death is the proper sentence, we must determine: (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether an independent weighing by this court of the aggravating and mitigating circumstances indicates that death is the proper sentence; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and Sneed.

After Sneed was convicted of the capital offense charged, a separate sentence hearing was held before the jury in accordance with §§ 13A-5-45 and -46. After hearing evidence concerning aggravating and mitigating circumstances, after being properly instructed by the trial court as to the applicable law, and after being correctly advised as to its function in finding aggravating and mitigating circumstances, to the weighing of those circumstances and to its responsibility in reference to the return of an advisory verdict, the jury, by a vote of 10--2, returned the following verdict: "We the jury recommend that the defendant, Ulysses Charles Sneed be punished by death." (R. 3946.)

Thereafter, the trial court held another hearing, in accordance with § 13A-5- 47, to determine whether it would follow the jury's recommendation and sentence Sneed to death or to life imprisonment without the possibility of parole. The trial court ordered and received a written presentence investigation report, as required by § 13A-5-47(b), and complied with the provisions of said section. After the hearing, the trial court entered specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in § 13A-5-49 and the existence or nonexistence of any mitigating circumstance enumerated in § 13A-5-51. It also made specific written findings as to the existence of additional mitigating circumstances referred to in § 13A-5-52. It also made written findings of fact summarizing the crime and Sneed's participation in it. In its findings of fact, the trial court found the existence of the following aggravating circumstances: (1) that the capital offense was committed while Sneed was engaged in the commission of a robbery, § 13A-5-49(4); and (2) that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, § 13A-5-49(8). The trial court examined the evidence for mitigating

circumstances, pursuant to § 13A-5-51, and found the existence of three: (1) that Sneed has no significant history of prior criminal activity, § 13A-5-51(1); (2) that Sneed was an accomplice in the capital offense committed by Hardy, § 13A-5- 51(4); and (3) that Sneed's age (23 years old) at the time of the crime, § 13A-5-51(7). In finding Sneed's participation as an accomplice to be a mitigating circumstance, the court noted that his participation was not minor and, thus, the court gave that mitigating circumstance very little weight. In finding his age to be a mitigating circumstance, the court noted that because he was 23 years old at the time the crime was committed, the court also gave that mitigating circumstance very little weight. The trial court also examined the evidence for additional mitigating circumstances referred to in § 13A-5- 52, and found the existence of two nonstatutory mitigating circumstances: (1) Sneed's family, i.e, three children, three siblings, and his mother, by whom he was primarily raised; and (2) Sneed's character and remorsefulness for the murder.

Thus, the trial court found the existence of two aggravating circumstances and five mitigating circumstances. It considered the presentence report along with the advisory verdict of the jury and weighed the aggravating circumstances against the mitigating circumstances, and finding that the aggravating circumstances outweighed the mitigating circumstances, sentenced Sneed to death. Sneed was convicted of the offense of murder committed during a robbery in the first degree, § 13A-5-40(a)(2). This offense is defined by statute as a capital offense. We take judicial notice that similar crimes are being punished capitally throughout this state. See, e.g., *McNair v. State*, 706 So.2d 828 (Ala.Crim.App.1997), *cert. denied*, 523 U.S. 1064, 118 S.Ct. 1396, 140 L.Ed.2d 654 (1998); *Henderson v. State*, 583 So.2d 276 (Ala.Crim.App.1990), *aff'd*, 583 So.2d 305

(Ala.1991), *cert. denied*, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992); *Kuenzel v. State*, 577 So.2d 474 (Ala.Crim.App.1990), *aff'd*, 577 So.2d 531 (Ala.), *cert. denied*, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991). In fact, two-thirds of Alabama's death sentences have been imposed on defendants convicted of capital murder arising out of murder-robbery. *McNair v. State.*

We have carefully searched the record of both the guilt and the sentence phases of Sneed's trial, and we have found no error warranting reversal. In reviewing the sentence, we find no evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. The trial court's findings and conclusions in support of the death sentence are supported by the evidence in the record. Furthermore, our independent weighing of the aggravating circumstances and the mitigating circumstances convinces us that death is the appropriate sentence in this case; therefore, we concur in the trial court's judgment. Considering the crime committed and considering Sneed, we find that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases.

Accordingly, Sneed's conviction and sentence of death are due to be, and they are hereby, affirmed.

The foregoing opinion was prepared by Retired Appellate Judge John Patterson while serving on active duty status as a judge of this court under the provisions of § 12-18-10(e), *Ala. Code* 1975.

AFFIRMED.

LONG, P.J., and McMILLAN, COBB, BASCHAB, and FRY, JJ., CONCUR.